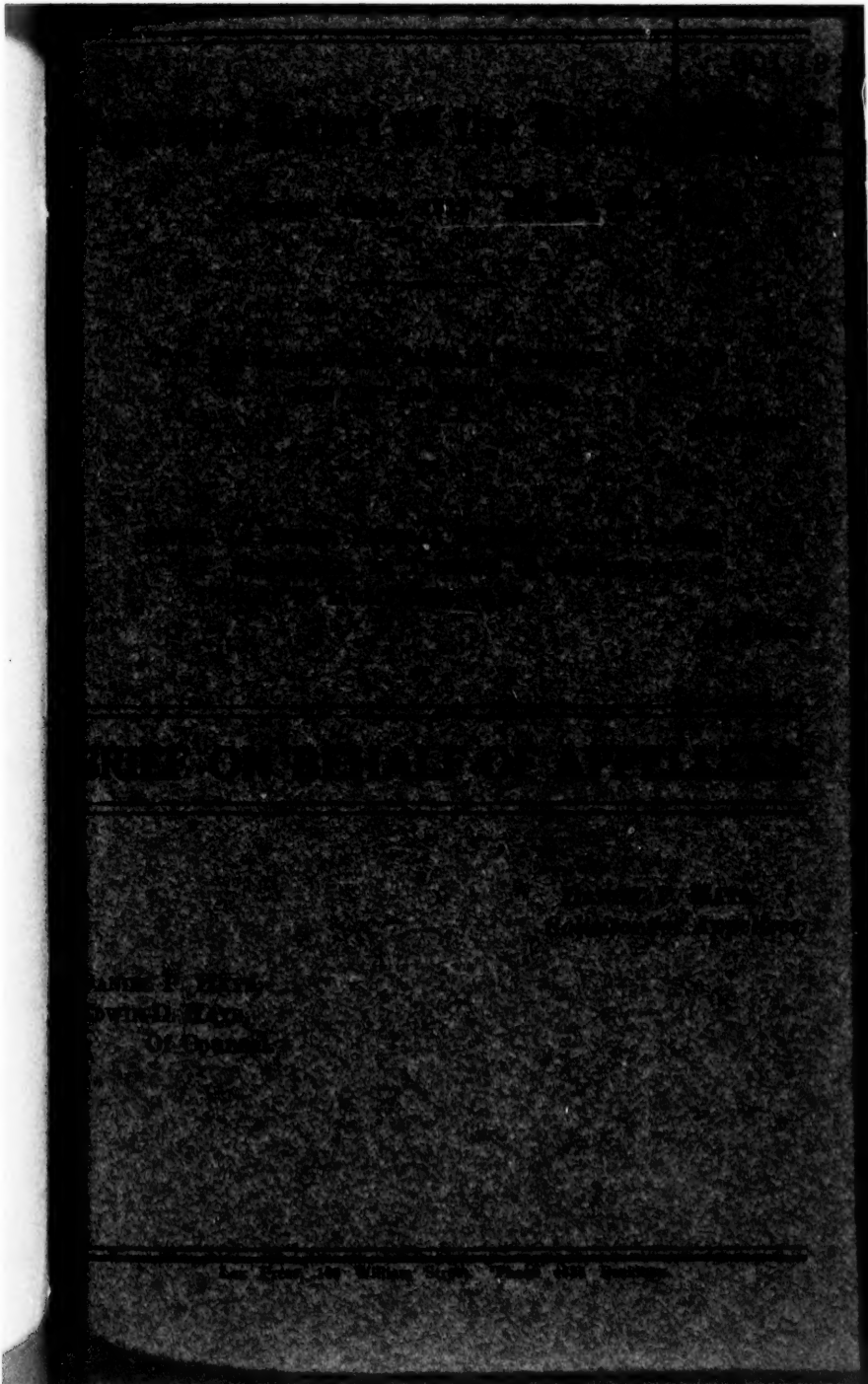

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Supreme Court

OF THE UNITED STATES.

THE MECHANICS AND METALS NATIONAL BANK OF THE CITY OF NEW YORK,

Appellant,

vs.

IRVING L. ERNST, LINDSAY RUSSELL and HARFORD T. MARSHALL, as Trustees in Bankruptcy of DUDLEY P. HUMPHREY, *et al.*,

Appellees.

October Term, 1912.
No. 995.

BRIEF ON BEHALF OF APPELLEES.

This is an appeal from a final decree, rendered by the Circuit Court of Appeals for the Second Circuit in the above entitled cause on the 23rd day of December, 1912, affirming the final decree herein of the District Court of the United States for the Southern District of New York, made and entered on or about the 9th day of January, 1912 (p. 520). The said decree of the District Court confirmed the report of Hon. Charles F. Brown, the Special Master before whom this cause was tried (pp. 351-353).

The appellees, Trustees in Bankruptcy of J. M. Fiske & Co., brought this action to set aside the transfer of moneys and securities made by the bankrupts to the appellant, on the day the petition in bankruptcy herein was filed, upon the ground that such transfer constituted a voidable preference within the meaning of the Bankruptcy Act.

The issues raised by the pleadings.

The bill of complaint, after alleging the filing of the petition in bankruptcy against the stock brokerage firm of J. M. Fiske & Company and proceedings resulting in the election and qualification of appellees as Trustees, sets forth in substance:

That, on January 19th, 1910, appellant was an unsecured creditor of the bankrupts in the sum of about $500,000. That upon that date and for a long time prior thereto, the bankrupts were insolvent, and on that date and while insolvent transferred and delivered to appellant, as alleged payment of said indebtedness, property consisting of cash, checks, stocks and bonds, of the value of about $450,000; that on January 19th, 1910, appellant knew and had reasonable cause to believe the bankrupts were insolvent; that appellant received said transfer and delivery of moneys and securities in order to enable itself to receive a greater percentage on its alleged debt than any other creditor of the same class; and that appellant had reasonable cause to believe that it was intended thereby to give a preference (pp. 6-13).

The appellant by its answer admitted it received certain moneys and securities from Fiske & Company on January 19th, 1910, but denied all other material allegations of the bill herein in regard to the preference, and setting up its own version of the transactions of January 19th, 1910, alleged (p. 21) that "it was understood and agreed between the defendant and the said firm, at the time of the making of said advance (the loan of $400,000) at or about the opening of business on the 19th day of January, 1910, and in accordance with the terms of said agreement bearing date the 8th day of November, 1901 (pp. 23-25), and in accordance with the gen-

eral usage which had long prevailed in the transaction of such business between the defendant and the said firm, and between banks and banking institutions in the City of New York and brokers, members of the New York Stock Exchange, a usage which was well known to all persons doing business with said firm and the members thereof, including its and their existing creditors, that advances thus made should either be paid off at various times throughout the day during which said advances were made, out of the proceeds of securities which were deliverable by the borrowers on said day, or, in the event of the payment of said advances not being made in full by the close of business on said day, the remainder of said advance should be secured by the deposit by the borrower, before the close of business on the same day, of securities obtained by the said firm with the proceeds of said advance or advances."

The defendant then alleged that the checks, stocks, bonds and other securities, referred to in the bill of complaint, as having been received by it, were received pursuant to said general usage, understanding and agreement and pursuant to the agreement bearing date the 8th day of November, 1901 (pp. 14-25).

Upon the issues thus joined testimony was taken and the folowing facts appear:

Facts.

(a) *As to the loan and creation of indebtedness.*

On the morning of January 19th, 1910, there was on deposit with appellant bank to the credit of Fiske &Company the sum of $36,239.47 (p. 80), and the bank also held three promissory notes of said firm, amounting to $70,000, which were secured by collateral, deposited with said bank at the time

the loans were made, and still held by it at that time (pp. 82, 103, 104).

At about ten o'clock on the morning of the 19th, the bank received a request as follows:

> "Please loan us to-day $400,000, crediting this amount to our account, and oblige,
> J. M. Fiske & Co." (pp. 80, 379).

The bank thereupon made the loan, as requested, and credited the amount upon its books to the firm (p. 80), thus making the amount with the bank to the credit of Fiske & Company on the morning of the 19th $436,239.47.

There was no conversation between any representatives of the bank and of Fiske & Company at the time of making this loan, nor was there any contract or writing signed on that day by either party other than the direct request for the loan made by Fiske & Company and hereinabove quoted (p. 105).

It appeared, however, that the bank had a general agreement with Fiske & Company, executed on November 8th, 1901, which is the agreement referred to in the answer of the bank and set forth in full in appellant's brief at pages 3, 4, & 5.

This agreement is the ordinary printed agreement generally used by the bank in dealing with its customers, and the substance of it is as follows:

First, the bank was given a general lien upon all securities deposited with it by the firm and upon the balance of the deposit account, existing from time to time, and upon all property of the firm left with the bank for safe-keeping, or otherwise, or coming into the hands of the bank as security for any and all liabilities of the firm to the bank then existing or thereafter contracted;

Second, the bank had the right to require ap-

proved additional security, and upon the failure of the firm to deliver the same, all liabilities of the firm immediately became due.

Third, upon the failure of the firm to pay any indebtedness to the bank and to keep up its margin and collateral, the bank had the right, without advertisment and without notice, to sell the securities held by it and liquidate the liability of the firm to it (pp. 23-25).

The bank had been doing a like business with the firm for years, had daily made similar loans ~~loans~~ to the firm of four or five hundred thousand dollars (p. 81), and each of these loans had been repaid, at the close of the day on which made, by a check of Fiske & Co. (pp. 81-85). Although this was the undoubted fact, Mr. Roe, the cashier of the bank, and the chief actor in its behalf, was, at first, reluctant to admit it and endeavored to make it appear that these day loans were sometimes paid either by Fiske & Company sending in securities, making deposits or drawing their check at the end of the day (p. 81).

When asked, however, to state any occasion on which the firm had paid the loan by sending in securities, he instanced two occasions. In neither case, however, were the securities *received by the bank in payment of the loan of the morning.* In each case, Fiske & Co., having sent in such securities, obtained from the bank a new loan thereon, pledging such securities as collateral thereto and leaving them in the possession of the bank. After receiving such loans, Fiske & Co. drew a check to the bank to pay off the loan of the morning (pp. 85, 81-83).

For instance, on the morning of the 18th of January, 1910, the bank loaned the firm $500,000 on a request similar to the one above quoted (p. 82). Before the close of business on that day, the firm

sent to the bank: 200 U. S. Steel, 10 Sloss Sheffield, 10 Chicago and Alton; upon which they received a loan of $15,000 (p. 82). After this loan was credited to their account, they drew a check for $500,000 to the bank, whereupon the loan of the morning was marked "paid" on the same day (p. 82). Again, on the morning of January 7th, the bank loaned the firm $400,000 on a similar request (p. 83), and, later in the day, received from the firm: 100 Wabash, preferred, and 200 U S. Steel, and loaned it thereon $5,000 (p. 83). The unsecured loan of $400,000 was paid off on the same day by a firm check for that amount (p. 83).

Mr. Roe admitted *there was no entry on the books of the bank, showing that securities were ever received as payment of or security for any of these unsecured daily loans* (p. 84); but on every occasion of a loan of this character, the loan was paid off the same day by check.

(b) *As to the unlawful preference and receipt of securities.*

On the morning of the 19th, after the bank had loaned the $400,000 above-mentioned, Mr. Roe heard "rumors" about J. M. Fiske & Company. One of the clerks in the receiving teller's department of the bank told him about the "rumors" (p. 85). Mr. Roe knew there was a "great disturbance" in the stock market that morning (p. 86) and heard that there was some "trouble" on the Exchange and learned that it was rumored that Fiske & Compaay were in trouble (p. 86). The bank had a stock exchange ticker, but no news ticker (p. 85).

The clerk in the receiving teller's department gave Mr. Roe the impression that there was "something wrong" with Fiske & Company—that they were being "talked about." *It was something about their "financial standing"* (p. 87). The name of

this clerk was George Clark. He was, at the time of the trial, in the employ of the bank (p. 87), and was not called as a witness by it. When Mr. Roe heard the "rumor," he proceeded to close the account and gave instructions to the employees, not to make any more payments on the account of Fiske & Company. He instructed the certification department, the paying teller, and the receiving teller *not to pay any more checks nor to certify any more checks* of that firm (p. 87). He first ascertained how much the firm had drawn (p. 88). Then he went *immediately* around to Fiske & Company's office and saw Mr. Sherwood of that firm (p. 88). Before that, however, he had spoken to Mr. Knowles, the Vice-president of the bank, and had told him what he had heard, and that the firm was being "talked about" (p. 89). He had consulted with Mr. Knowles about the matter for a few minutes and had told Mr. Knowles that he would go around and see Sherwood (p. 90). The only investigation he made was to see how much Fiske & Company had drawn (p. 89). Mr. Roe was in a hurry and wanted to make time. He wanted to get the account secured just as quickly as possible (p. 90). He had never been to Fiske & Company's office before (p. 90). It was unusual for him, as cashier of the bank, to go around to customers, to whom loans had been made, endeavoring to get them to put up collateral. It was an extraordinary occurrance (p. 214). Only once before during his whole connection with the bank had such a thing occurred (p. 91). He lost no time in getting to Fiske & Company's office and reached there about twelve o'clock (p. 92). Fiske & Company were at 42 Broadway; the bank was at 33 Wall Street (p. 92). When Mr. Roe arrived at the bankrupt's office, he saw Mr. Sherwood there and told him that he had heard "rumors" about the firm; that they

had had checks certified to a considerable amount that morning and had not yet made a deposit; that he thought Mr. Sherwood had better give him some securities (pp. 92, 94). Mr. Roe did not remember the exact words used (p. 92). When Mr. Roe had stated that he had heard "rumors" that the firm was in trouble, Mr. Sherwood gave him no positive answer, but made an "evasive reply" (p. 94). Mr. Roe did not insist upon a definite answer, but on getting some securities (p. 94). Mr. Sherwood gave him securities and told him there was a deposit on the way around (p. 94). Mr. Sherwood did not tell how much the deposit was; Mr. Roe does not remember if he asked him how much it was (pp. 94, 95). Mr. Roe was there talking to Mr. Sherwood two or three minutes. The securities were obtained by a clerk or one of the partners and given to Mr. Sherwood, who handed them to Mr. Roe (p. 98). Mr. Roe just glanced over the securities and put them in his pocket, but made no list of them (p. 98).

Mr. Roe took whatever he was given and was glad to get that (p. 95, 98). His idea when he went to Fiske & Company's office was to get securities and be back at the bank as quickly as possible (p. 95). As soon as Mr. Roe got the securities, he started back (p. 95). He arrived at the bank shortly after twelve o'clock (p. 96). In his opinion it would take a little over five minutes to go from the bank to 42 Broadway, and it might have been ten minutes. He did not lose any time on the trip and was in Fiske & Company's office less than five minutes (p. 97).

When Mr. Roe came back to the bank, he found (p. 110) the deposit, spoken of by Mr. Sherwood, had arrived, and amounted to $54,048.18. As the bank had previously stopped payment of the checks of J. M. Fiske & Company and the so-called deposit of $54,048.18 was not received by the bank

as a deposit, Fiske & Company could never draw against it. It was credited to the account as a payment on account of the indebtedness (pp. 312, 313).

Mr. Roe immediately turned the securities over to the Assistant Cashier, Mr. Robinson, who was in charge of the loan deuartment, and instructed him to have a list made of them, which was immediately done (p. 99). He gave instructions to close the account and to have it balanced at once (pp. 106, 107).

Immediately after they made a list of the securities and filled in the values, the ledger account was balanced (p. 100). It took some time to make up the figures, which had to be done before the account could be balanced. It was learned that the account, irrespective of the securities, needed $242,207.57 to balance (pp. 101, 102, 105).

Before the closing of their account, Fiske & Company had three loans outstanding with the bank; one of $50,000 of November 19th, one of $5,000 of December 15th, and that of $400,000 of January 19th (p. 104). After the closing of the account, all the collateral in the hands of the bank, including the securities received by Mr. Roe, as stated, were held by the bank as security (p. 102) for the general balance of $242,201.57 (pp. 104, 103). The account was closed by entering a loan for the latter amount upon the books of the bank, and the securities were held as collateral to the loan. A bookkeeping debit entry was made of the $400,000 (p. 106). Thus, the loan of $400,000 was cancelled and together with it an entry was made of a credit of $242,201.57 (p. 106). *All of this was done without consulting Fiske & Company.* Mr. Roe testified there had been no conversation with any member of that firm, except the conversation between him and Mr. Sherwood at the time the securities were received (p. 105).

The securities which were received from Fiske & Company were subsequently sold for $175,647.45 (p. 100).

The bank also realized upon the securities held by it for the two loans amounting to $55,000, a considerable sum. It appears from the defendant's answer that the total value of the securities held by it was $239,495.

(c) *As to insolvency.*

As heretofore stated, the time at which the bank received the securities and the $54,048.18 in cash, the transfer of which is claimed herein to be a voidable preference, was *about twelve o'clock on January 19th.* It was demonstrated beyond doubt by the appellees that the firm of J. M. Fiske & Company and all its individual members were insolvent at that time. The firm suspended at 12.40 P. M. on that day (p. 96), and thereafter at 3.25 P. M. on the same day, an involuntary petition in bankruptcy was filed against them and a receiver appointed (pp. 398, 137).

The uncontradicted evidence is that on the 19th day of January, at twelve o'clock, noon, the face value of the assets of the firm was $745,919.58, and its liabilities $904,570.02 (p. 171). It is further shown that the real value of the assets was much less than that figure, inasmuch as there were included therein, among other things, so-called "accounts collectible" of the value of over $430,000, which were uncollectible.

The testimony, on which these figures are based, will be discussed in detail under Point IV hereof.

Eliminating from the assets these bad accounts, the value of the assets at twelve o'clock was not $745,919.58, but was less than $316,000. The only possible assets, which the appellant under any circumstances might claim to be not included in the

$316,000, is a claim against James R. Keene. That, according to the testimony, could not, in any event, exceed $50,000 to $90,000 (pp. 273, 274). (This claim against Keene was later settled for $41,379.33, this, the record does not show). If this $90,000 is added, for the sake of an argument, to the value of the assets, then the total value of the assets of J. M. Fiske & Company at twelve o'clcok on January 19th could not have exceeded $401,000, whereas its liabilities were $904,570.02. Not only was the firm undoubtedly and hopelessly insolvent, but each member thereof was likewise insolvent. Each member, except Clifford M. Washburn, testified to have been insolvent on January 19th, and showed his liabilities exceeded his assets.

It was stipulated as to Clifford M. Washburn that he would testify his liabilities were $96,428.91 and his assets $276.20 (p. 261).

It is further shown that at 12:40 P. M. on January 19th, J. M. Fiske & Company notified the Exchange they were unable to meet their obligations, and the firm was thereupon suspended (pp. 41, 42, 379).

Mr. Ernst, Receiver in bankruptcy of J. M. Fiske & Company, and now one of the trustees, testified what assets came into the hands of the Receiver and the Trustees. His testimony shows it to be doubtful whether these assets would realize as much as $200,000 (pp. 126, 127, 132, 157, 158, 400, 401), on the one hand. On the other hand, the amount of the claims of creditors filed with the Referee is over $1,000,000 (p. 452).

(d) *As to the defense.*

The appellant's counsel in the "Statement of the Case" contained in his brief, outlines elaborately an alleged general custom under which he contends the transactions herein involved were had.

We submit that this statement of the alleged custom is rather an exposition of appellant's claims and conclusions than of facts proven by the evidence; that it is based upon the opinions of witnesses and not upon evidence of facts; that it is contradicted by the admitted facts.

We shall not, however, argue the matter here, but shall merely outline the evidence and leave the discussion of what custom, if any, was proven for a later point in our brief.

The substance of the evidence bearing upon the defense and particularly that relating to the alleged custom, as we understand it, is as follows:

Mr. Roe, the cashier of appellant, stated on cross-examination (p. 111) that all loans to Fiske & Company were made under the agreement dated November 8, 1901, hereinbefore referred to. A copy of the agreement is annexed to the answer (pp. 23-25). Its provisions have already been set forth above.

Mr. Roe further testified that the reason he asked of Mr. Sherwood, why the deposits did not come around was, that the firm of J. M. Fiske & Company had drawn a considerable amount against the credits received in the morning and had not yet made a deposit, notwithstanding it was some time since the withdrawals had been made (p. 112); that it was customary for brokers to deposit checks to the amount of the loan as soon as the checks, which they obtained for the payment of the stocks, which they take up, were received by them (p. 113). He was then allowed to testify, over the objection of appellees, to a supposed general custom in the case of such loans. He testified: "The custom is, that the broker will send in a request for a credit, when he requires the same to clear his stocks, and the amount is credited to his account on the ledger, under the agreement which we have on file with

all the brokers. The broker then uses that credit to accept the delivery of stocks and pays for them, or to pay off a loan with another institution, and it is customary for him to send a deposit of the checks, which he receives, to the bank as fast as they are received" (p. 115).

He further testified as to the custom: "The custom is for brokers to make deposits at the bank as soon as their checks are received, that is, immediately making the deposits without delay, or securities to cover the amount of the advance made for the purpose of clearing their stocks" (p. 115). But when asked to specify the instances, where "*securities*" were delivered to the bank by the brokers, he only named the two hereinbefore referred to on pages 5 and 6 of this brief, and in both of these cases new loans were made by the bank on the securities delivered to it.

It will be noted that this is in conflict with the written agreement, offered in evidence by the bank, under which the brokers were to make further deposits of securities upon request.

Mr. Roe further testified that in the ordinary course of business such deposits of checks are sometimes made fifteen or twenty minutes after the payments are made and sometimes later (p. 116).

He further testified that the custom was "if a deposit is not forthcoming immediately, to call up the broker or send around and ask why the deposit has not been received, and to hurry them up in making the deposit" (p. 117).

He stated that the custom was for the broker in each case either to send his check to cancel the daily advance, or for the bank to charge it up after receiving a check from the broker, and that if the checks and deposits were not sufficient, the loan is cancelled and another loan is put through for the proper amount that is necessary (pp. 118-120).

Other witnesses were called by appellant to testify to an alleged custom existing in regard to these daily loans. Their versions of the custom differ in certain respects from the version testified to by Mr. Roe, appellant's cashier. The difference will be more fully pointed out. There was also a stipulation as to what other bankers and brokers would testify.

Particular attention is called to the testimony that the loan was not to be paid off by the deposit of securities with the bank, but in cash, and that the understanding was that the bank was not to be forced to make a loan on securities (pp. 222, 240, 241), that in no case was collateral deposited to secure a day loan, but that, when the broker was short of money with which to pay the day loan and could not borrow it elsewhere, in some cases new collateral loans were made, and the day loan paid in cash; that in such cases the collateral might be any good securities, however obtained by the broker (pp. 230, 268); that the loan was always credited to the general deposit account of the broker, and no separate account kept of the moneys or securities purchased with the proceeds of the loan (pp. 266, 267). Mr. Carse also testified that the understanding was that the loan was to be paid off any time during the business day. The customer had until the end of the day to pay the loan (p. 228).

Mr. Carse, Vice-President of the Hanover National Bank, said: "If the broker should overlook making his deposits during the day, the bank would call him up on the telephone, if it got along towards 2 or 3 o'clock" (p. 220).

Not all the large Wall Street banks, as appears, adopt this alleged customary method of doing business. The First National Bank, a large bank actively engaged in this business, takes from the

brokers a memorandum specifying in detail the securities which are expected to be cleared by the proceeds of the loan (p. 263).

The appellant, at page 14 of its brief, states that the finding of the Special Master, that there was no proof that the securities deposited as collateral to the two collateral loans made to J. M. Fiske & Co. by it, one of $5,000 on January 7th and the other of $15,000 on January 18th, were obtained with the proceeds of the day loans, made on said days, is incorrect, and attempts to show by certain entries in the books, that the securities deposited as collateral for said loans were obtained by the use of the proceeds of the day loans.

We consider that the manner in which these securities were obtained is of little importance, in view of the fact that according to the testimony of Mr. Roe they were not delivered to the bank to secure the day loans, but that, in each case, a separate collateral loan was made thereon.

The fact is, however, that the Master is correct in his finding.

The entries in the books do not prove the appellant's contention, ~~first, because the prove the appellant's contention~~, first, because the mere fact that the check with which the securities were purchased was a check drawn upon the Mechanics' Bank does not prove the check withdrew the proceeds of the day loan made on each of the said days, rather than other moneys so deposited to the credit of the bankrupts, and, furthermore, because it affirmatively appears that among the securities deposited as collateral to the $15,000 loan made on January 18th were ten shares of Sloss-Sheffield, which the books show, and the appellant admits, were received by Fiske & Co. for transfer on January 11th, 1910, that is to say, prior to the making of th day loan on January 18th, 1910. Clear-

ly, these securities cannot be said to have been obtained by Fiske & Co. by the use of the proceeds of the day loan made on January 18th.

The appellant, furthermore, did not make any such claim before the Master or suggest that the books would show such to be the fact, nor did it contend before him or the District Court that there was proof to this effect. Its contention, now made, is based upon entries in the books not heretofore called to the attention of counsel for the appellees until the service of its brief in the Circuit Court of Appeals.

The foregoing are the facts and the testimony, in substance, upon which the parties make their respective claims.

The appellees claim they have proven thereby without contradiction all the allegations of their complaint and that the appellants have failed to establish any defense to this action.

Facts Decided by the Master.

The Master found upon the facts in favor of the appellees (pp. 278-323). He found at the time of the transfer Fiske & Co. were insolvent, and that the bank had, at said time, had reasonable cause to believe a preference was intended (pp. 284-285).

He also found the bank had failed to prove the existence of any contract, or any custom under or by virtue of which the bank was to have a lien on the securities and funds transferred to it and that the proven fact negatived the existence of any such contract or custom (p. 297).

The Master was supported in his finding by both the District Court (pp. 337-346) and the Circuit Court of Appeals (pp. 514-519).

POINT I.

The appellant acquired no equitable lien upon the securities or moneys in question. There was no agreement or mutual intention that the appellant was to have a lien upon any funds or securities not in its actual possession. No custom was proven from which such intention could be inferred.

A.

INTRODUCTORY STATEMENT.

The appellant's defense, stated briefly, is, that it had an equitable lien or right in and to the securities transferred to it. In order to establish such a lien, it was incumbent upon the appellant to show, that, by express agreement, the mutual intention of the parties to the transaction was to create such a lien, or to prove the existence of a general custom, from which such intention could be inferred.

The definition of an equitable lien, contained in Pomeroy on Equity Jurisprudence, quoted by appellant, at pages 38 and 39 of its brief, and the other cases therein cited, all recognize, that the intention, to give a lien, is a necessary element to the existence of an equitable lien.

Our contention is, that the appellant failed to prove any facts, establishing the existence of this intention, or from which its existence could be inferred.

The general statement of facts under the title of "Day or clearance loans," under the first point of

the appellant's brief, is rather, a presentation of the claims, upon which it seeks to apply the principle of law, than a statement of the facts, as they appear in the evidence. We shall show this, in the subsequent subdivision of this point by a careful analysis of the evidence, and shall show, that, according to the evidence, the transaction between the parties on January 19th, 1910, was that of a simple unsecured loan of $400,000, made by the bank to the brokers, which was to be repaid that day in cash, and that this was the usual way, in which the day loans were made.

We shal further show, that the manner, in which business is done in the financial district in New York City, and the manner, in which the transactions, involved in this case, were had, negative the existence of any intention on the part of Fiske & Co. or the bank hereto, that it was to have an equitable lien upon the securities and moneys, subsequently transferred to it.

In connection with the discussion of these facts, it is necessary to have in mind the nature of the stock brokerage business. The entire business of a broker, from day to day, is the purchase and sale of securities and the borrowing of money thereon. He necessarily does a banking business with but one bank, where he has a general account, in which both his deposits and the moneys borrowed by him from the bank are credited. Naturally all the money, received by the broker from whatever source, is deposited by him in this general account. All withdrawals from his account with the bank, in which both his deposits and loans are thus credited, if made for business purposes, are used either to pay for securities or to pay off loans. In other words, they are for what the appellant designates, as "clearance" purposes. The entire business of the broker may well be said to involve the clearance of securities, so that a business loan, made under any

circumstances, is used for the clearance of stock. In this respect there is nothing peculiar about the day loan.

B.

THE ENTIRE CONTRACT BETWEEN FISKE & CO. AND THE APPELLANT, IN REGARD TO THE BORROWING OF $400,000 ON JANUARY 19TH, IS EVIDENCED BY THE WRITTEN REQUEST FOR A LOAN, TOGETHER WITH THE WRITTEN AGREEMENT OF NOVEMBER 8TH, 1901, AND UNDER SUCH CONTRACT, THE APPELLANT DID NOT OBTAIN A LIEN OF ANY NATURE UPON ANY SECURITIES OR MONEYS NOT IN ITS POSSESSION.

The contract made by Fiske & Co. with the bank on the morning of January 19th, when it borrowed from the bank $400,000, was simple and complete. Fiske & Co. had a written agreement with the bank, under which the parties had been doing business since 1901. A copy of this agreement is annexed to the defendant's answer and the agreement itself was offered in evidence (pp. 11, 452). The agreement provided, that Fiske & Co. should receive accommodation from the bank, and provided that the bank should have a lien on all moneys and securities *which should come into its possession* for any liability of Fiske & Co. and that it should have the right, at any time, to demand additional security upon any existing liabilities of the firm.

The bank was also empowered, in the event of any default on the part of Fiske & Co. in any of their obligations, or upon their failure in business, to sell the securities held by it at public or private sale. The agreement was to apply to all existing and future transactions between the firm of Fiske & Co. and the bank.

On the morning of January 19th, Fiske & Co. sent the following request to the bank:

"New York, January 19th, 1910.

"MERCHANTS NATIONAL BANK,
NEW YORK CITY.

Please loan us to-day four hundred thousand ($00,000) Dollars, crediting this amount to our account, and oblige

J. M. FISKE & Co." (p. 80).

The bank immediately complied wit hthe request and credited the amount of $400,000 to the account of Fiske & Co. (p. 80).

It does not appear that anything else was said or done in reference to the loan. The transaction was complete. It constituted a call loan of $400,000, subject to the terms and conditions of the written agreement.

The same practice had existed between the bank and Fiske & Co. for years prior (p. 81).

The rights of the bank in regard to security were clearly set forth in the written contract. It had a lien on all securities in its possession. Nothing was agreed to or said about any further lien, except that the agreement gave the bank the right to call for further security, but this privilege did not give it a legal or equitable lien on any securities in the possession of Fiske & Co.

It did not give it a legal lien because possession is necessary for the existence of a legal lien.

Re Faulhaber Stable Co., 170 Fed., 68.
Sexton v. *Kessler & Co.*, 172 Fed., 535.
Casey v. *Cavaroc*, 96 U. S., 467.

It did not give it an equitable lien, because a mere *agreement to give security when called* upon does not create an equitable lien, or prevent the transfer of property under such an agreement, if the transfer would otherwise be voidable, from being a voidable preference.

Re Smith, 176 Fed., 426.
Re Faulhaber Stable Co., 170 Fed., 68.
Smedley v. *Speckman*, 157 Fed., 815.
Torrance v. *Winfield National Bank*, 71 Pac., 235 (11 Am. Bk. Rep., 185).
Mathews v. *Hardt*, 79 App. Div. (N. Y.), 570.
Ryttenberg v. *Schefer*, 131 Fed., 313.

Thus, under the written agreement, the appellant had no lien ,either equitable or legal, on any property of Fiske & Co. not in its possession.

C.

ASSUMING THAT THE EVIDENCE, AS TO THE ALLEGED CUSTOM HEREIN, WAS ADMISSIBLE IN THIS CASE TO ADD TO THE WRITTEN CONTRACT, THE APPELLANT FAILED TO PROVE ANY GENERAL CUSTOM, FROM WHICH, AN AGREEMENT, THAT THE BANKERS WERE TO HAVE A LIEN ON THE SECURITIES AND MONEYS TRANSFERRED, TO IT, CAN BE IMPLIED.

Assuming that evidence of such a custom was admissible, yet the burden was on the appellant to establish the existence of such a custom by competent evidence. This the appellant absolutely failed to do. It did not offer evidence of any facts, tending to establish the existence of general custom, but relied entirely upon the speculative opinion of various persons in regard thereto.

It could not prove a custom in this manner. As stated in the case of *Willis* v. *Tibbals*, 33 N. Y. Superior Court, 220, at page 228:

> "A usage must be proved by evidence of facts, 'not by mere speculative 'opinion (Greenl. on Ev. §251; Stark. on Ev., Vol. 2, p. 361)."

The testimony must be not as to what the witnesses understood, but what was done in numerous instances and acquiesced in by the parties.

In *Allen* v. *The Merchants Bank of New York*, 22 Wendell (N. Y.) 215, the Chancellor said at page 222:

> "The custom of merchants or mercantile usage does not depend upon the private opinions of merchants as to what the law is, or even upon their opinions, publicly expressed—but it depends upon their acts; or, as the learned Chief Justice very correctly says: 'The inquiry in such cases is not after the *opinions* of traders and merchants in respect to the *law* upon a mercantile question, but for the evidence of a *fact*, to wit, the usage or practice in the course of mercantile business in the particular case.'"

In *Mills* v. *Hallock*, 2 Ed. Ch. (N. Y.) 652, the Vice-Chancellor stated, at page 656:

> "A custom must be proved by evidence of facts (and not by mere speculative opinion); by means of witnesses who have had frequent and actual experience of the custom. The testimony of those who speak from report only, and not from particular instances within their own knowledge, if receivable at all, is of no weight."

In *Gallup* v. *Lederer*, 1 Hun (N. Y.) 282, Judge Daniels said, at pages 286 and 287:

> "To prove the existence of a custom, something more than the judgment or conclusion of the witness, called to support it, is required. A custom is the result of usage, and can only be properly shown, by proof of the usage from which it may be claimed to be derived. The inquiry in such cases is not after the opinions of traders and merchants, in respect to the law upon a mercantile question, but for the evidence of a fact, to wit, the usage or practice

in the course of mercantile business in the particular case."

In the case of *Ames* v. *Kimball*, 125 Fed., 332, Judge *De Haven* said, at page 335:

> "The defendant sought upon the trial to show a local usage at the port of Nome exempting persons engaged in lightering merchandise from liability for loss or damage to such merchandise occasioned solely by perils of the sea, but the evidence offered was not sufficient to establish such a usage. No witness testified to any instance in which such a usage had been recognized and acted upon by the parties interested, when goods had been lost or damaged by perils of the sea while being lightered to the beach at Nome. Two witnesses stated generally that there was such a usage; but one seems to have based his statement upon the fact that he had previously entered into an agreement with the North Coast Lighterage Company to do lighterage for him, in which it was agreed that the lighterage company was not to be liable for damage or loss of goods while in transit from the ship to the shore; and the other, upon conversation he had had with persons engaged in the business of lightering, in which he was informed by them that they would not be responsible for loss or damage occasioned by perils of the sea. This evidence is certainly not sufficient to establish a usage. 'Usage is a matter of fact, not of opinion. Usage of trade is a course of dealing; a mode of conducting transactions of a particular kind. It is proved by witnesses, testifying of its existence and uniformity from their knowledge obtained by observation of what is practiced by themselves and others in the trade to which it relates.'"

See also:

Oelricks v. *Ford*, 23 How. (U. S.) 49.
The John H. Cannon, 51 Fed., 48.

When the testimony of the witness, called by the appellant to prove the alleged custom, by which it is claimed the understanding was that the bank was to have a lien on the securities obtained by Fiske & Co., by the use of the money borrowed, is examined and judged by the test established by the above decisions, it is seen to be clearly incompetent and insufficient. It is not testimony as to facts, but only the opinion of witnesses, as to what they think their legal rights to be, or as to their hopes in regard to the transaction.

Mr. Roe, the Cashier of the bank, for instance, testified:

> "The custom is, that a broker will send in a request for a credit when he requires the same to clear his stocks, and the amount is credited to his account on the ledger, under the agreement which we have on file with all brokers. The broker then uses that credit to accept the delivery of stocks, and pays for them, or to pay off a loan with another institution, and it is customary for him to send a deposit of the checks which he receives to the bank as fast as they are received. * * * That is, immediately making the deposits without delay, or the securities to cover the amount of the advance made for the purpose of clearing their stock (p. 115). * * * The deposits are sometimes made 15 or 20 minutes after the payments are made; sometimes deposits are received later (p. 116). * * * The custom is, that if the deposit is not forthcoming immediately, to call up the broker or send around and ask why the deposit has not been received, and to hurry them up (p. 117). * * * If the checks and deposits are not sufficient, the loan is cancelled; another loan is put through for the proper amount that is necessary" (p. 119).

How little of this testimony is based on actual facts and how much more on opinion, is evident.

when we examine, what the cashier testified was done in the case of Fiske & Co.

Fiske & Co. had signed the usual agreement when they started business with the bank. When they wanted a loan, they sent in a simple written request for the same, and the same was credited to their general account, with the other moneys which they had on deposit (pp. 80, 81).

It does not appear, from his testimony, that anything was ever said as to how the money, thus loaned to Fiske & Co., should be used by them. Mr. Roes testifiefid that they could draw their checks against it (p. 120). The loan was always paid off by Fiske & Co. by check, later in the day (pp. 81, 83-84). On the few occasions, when the amount on deposit in Fiske & Co.'s account was not sufficient for them to draw a check to pay off the loan, they did not pay off the loan by sending around securities, *but made a new loan upon collateral, which was credited to their account ,and then paid off the original loan by check* (pp. 82, 83).

There is no proof that the moneys, deposited by them and against which they drew their check each afternoon to pay off the loan, was the money realized from or borrowed on the stocks which were obtained with the money borrowed from the bank. In other words, all the cashier testified to of his own knowledge was, that a loan was made in the morning, that it was usually paid the same day, and that it was obtained by moneys deposited by Fiske & Co. How Fiske & Co. or any other brokerage firm used the moneys borrowed, whence they derived the moneys with which they paid the loan, was absolutely unknown to him. It was merely his guess or speculation.

His assertion that it was the custom that if the brokers did not pay the loan in cash, they were to deposit the securities obtained by them with the

moneys loaned by the bank, is merely an expression of the opinion of the witness as what ought to be done by the brokers. It is not a statement of a fact, *nor does the witness give a single fact* upon which he bases his opinion. It does not appear that Fiske & Co., or any other brokerage firm, ever gave securities to secure a daily loan; but, on the contrary, it appears that in every case the loan was paid in cash.

His testimony it not, therefore, evidence of any custom, but a statement of his legal interpretation of the transaction, and of his expectations as to what the parties were going to do, and does not in any way establish the defendant's contention as to the existence of the custom in question.

The next witness called by the defendant upon the question of custom was Henry R. Carse, the Vice-President of the Hanover National Bank. His testimony as to the custom is as follows:

> "The broker, in the morning, figuring up the amount of stock or securities he has to pay for, or the loans that he has to turn over, makes up a demand note for a round amount and sends it up to our loan desk with his pass-book; we make a loan for that amount, and enter it in the pass-book, and credit it on the ledger. A memorandum of this amount is made on the certification book, together with the amount of the balance to the credit of the account at the opening of business, and from time to time during the day any deposits that are made for the credit of the account; and against such credit we certify checks that are presented during the course of the day by the broker. *When the day's work is cleared up, the broker sends up a check to the loan clerk for the same amount as the notes.* We stamp the note 'paid' and return it to him. The check going through the books as a charge, offsets the credit that was made on the loan of the morning" (pp. 217-218).

> * * * "It has developed a form of trust, and the clear understanding implied between the broker and the bank is that whatever the broker obtains by the proceeds of the loan given to him is held in trust for the account of the bank, and is to be accounted for during that day. It being clearly understood that in no case shall this accommodation run beyond the day on which it is granted. If the broker pays for stocks or bonds, it is the understanding of the bank that they belong to them as collateral to their loan, and the broker simply retains possession of them long enough to make delivery and get payment. If the proceeds of the credits are used to pay for the loans which are already secured by collateral, the bank expects that collateral to be placed in another loan, which might either be with them or some other institution, and the proceeds of that loan would pay for this temporary loan, as we generally call it. These things are known as 'temporary day loans,' for the purpose of clearing the broker's business" (pp. 219-220).

The first part of the above testimony, except as to the manner in which the amount of the loan was figured, is a statement of the facts known to the witness in regard to these loans, but the latter part, that is, the part which begins with, "It has developed a form of trust, etc.," is clearly a statement of the witness' legal conclusions. This is evident from the language used by him and from his testimony on cross examination.

He knew that unsecured loans were made daily to stock brokers, and always paid in full the same day, by a check drawn against deposits made during the day by the broker. That was all he did actually know. He could guess for what the checks were being certified or what moneys were being deposited, but he could not tell positively (p. 233). He admitted this, and he also admitted that it made no difference to the bank, so long as the loan was

paid, where the money to pay it came from (p. 234).

In spite of his knowledge of these facts, the witness came to the belief and legal conclusion that, whatever the broker obtains with the proceeds of the loan, were held in trust, and testified that such was the custom. *However, the opinion and belief of the witness is immaterial.* It is not proof of anything. The Court can reach its own conclusion on the facts without the help of the witness, and his testimony, that the transaction was a form of trust, should be absolutely disregarded.

The statement of the witness that the securities, taken up by the broker, belong to the bank as collateral was likewise only his opinion. It certainly was not based on facts or personal knowledge, *for never had he known a case where the loan of the morning was not paid in cash on the same day, but security given* (p. 230).

On one occasion, where the broker did not have sufficient funds to pay the loan of the morning, the bank had not taken securities as collateral, but had made the broker a new loan upon collateral, and, with the credit thus received, the broker had paid the loan of the morning (p. 230).

As showing, that no lien was claimed upon the collateral, obtained by use of the day loan, Mr. Carse testified, that in cases, where the broker was short of money, with which to pay the day loan, he would make a new loan on any securities that were good, whether they were the result of the transaction with this day clearance money, or not" (p. 230).

His statement, that the securities, taken up by the broker, belong to the bank, therefore, was without foundation in fact: it was merely based on opinion, not upon what had been done in many instances and acquiesced in, and, taken with the rest of his testimony in regard to the existence of the alleged

custom, is entitled to no weight and should be absolutely disregarded.

The testimony of Mr. Alexander, Vice-President of the National Bank of Commerce, is not only subject to the same criticism, as has been made of the testimony of Messrs. Roe and Carse, but should also be disregarded because the form of the note used by the National Bank of Commerce expressly provided that the bank should have a lien on securities or the proceeds thereof, obtained with the money loaned by the bank, and his testimony, therefore, is not as to what occurred by reason of any custom, but by express agreement (pp. 444-446).

The fact, however, that this large bank insisted on an express agreement, casts much doubt upon the existence of the general custom claimed by the defendant.

The only other proof, by which the defendant attempted to establish the existence of the custom in question, is the stipulation (pp. 262-270), as to what certain bank officers and certain stock brokers who dealt with the said banks would testify to, the stipulation being in place of their testimony and being made subject to the objections which the plaintiff made in regard to all the testimony offered as to custom.

This stipulation, however, adds nothing to the appellant's case, for it is merely that the officers of these other Wall Street banks would testify in substantially the same manner as the witnesses Carse and Alexander testified, but as these witnesses did not testify to any facts, which showed the existence of any custom, the testimony of additional witnesses to the same effect could not strengthen appellant's case.

Similarly, the testimony of the stock brokers would have added nothing, for they would merely have corrobated the bank officers, that the loan was

made in the morning, the proceeds usually used to take up securities and pay off loans, and the loan was paid before the end of the day by check drawn against deposits made by them during the day (pp. 266-268). It does not appear, that they could have testified to any facts, showing, that it was the mutual intention, that the bank should have a lien on the stocks or the proceeds thereof, obtained with the money loaned by the bank, but, on the contrary, their testimony as stipulated expressly negatives the existence of any custom to this effect, *for it appears therefrom, that the loan was credited the same, as other moneys in the brokers' general deposit account; that the brokers mingled both the securities and moneys so received by them with other securities and moneys in their possession, and did not keep a separate account of the transactions, had with the moneys borrowed from the bank; that the loans were always paid by check and not by the deposit of securities; that when the brokers were short of funds, with which to pay the day loan, a new loan was negotiated, wherever obtainable, and, if obtained from the bank making the day loan, the securities, used as collateral for such loan, were any securities in possession of the brokers, from whatever source and however acquired by him. After the new loan was thus obtained the day loan was paid by check* (pp. 267-268).

Not only did the appellant fail to prove the existence of the alleged custom, but the evidence affirmatively establishes that no general and uniform custom existed. As stated in *Willis v. Tibbals*, 33 N. Y. Superior Court, 220, at page 230, the Chancellor said:

> "Usage must be established, known, certain and uniform."

The banks and brokers, however, do not seem to have adopted a uniform method of doing business in regard to daily loans to stock brokers.

The appellant bank obtains a general agreement from the customers. The Hanover National Bank, and the National Bank of Commerce demand note containing various provisions as to security. The form and substance of the notes of the two banks being substantially different (pp. 440-446). The First National Bank requires a demand note, in which the securities, to be given as collateral, are stated, and the Bank of Manhattan Co. does not obtain any note or agreement whatsoever (pp. 263-266). As stated by Mr. Alexander, they do not have uniform forms (p. 244).

Even the witnesses' opinions of the transactions, when examined closely, differ substantially. The answer sets forth that the money is borrowed to meet current obligations, and that the loan should be paid off at various times during the day (p. 20). The opinion of the witnesses was that the loan was to take up particular stocks, and that the loan was not paid off from time to time during the day, but in every instance by a check for the whole amount of the loan at the close of the day.

In many other respects, their testimony will be found to differ. Each bank seems to have adopted its own way of doing business, and each officer to have his own ideas in regard thereto.

Taken as a whole, the testimony as to custom is absolutely inconclusive. There are no facts on the record to show the existence of any custom. The only testimony is that the speculative opinions of witnesses and, under the decisions, that is no proof at all.

No witness testified to a transaction, by which the securities, obtained by the broker from the pro-

ceeds of the day loan, were pledged, as security for any part of such loan.

The learned Master in his opinion (pp. 297, 298) convincingly discusses the testimony as to the alleged custom, and says (p. 297):

> "This testimony fails to show the existence of any custom by which the securities obtained by the broker with the proceeds of the day loan were pledged as security for any part of such loan."

He then proceeds to give his reasons for this conclusion, and shows not only that no witness testified to such transaction, but that in each case and with each bank, where collateral securities were delivered to the bank, it was for the purpose of making a new loan, the proceeds of which were used to pay the day or clearance loan.

His final conclusion at pages 297, 298 is most forceful.

> "The conditions, therefore, do not exist out of which any custom or usage could arise. The custom as to security for unpaid debts cannot arise where all debts are promptly paid. If there are no unpaid debts and no debtors in default, there can be no established usage in relation to unpaid debts."

D.

THE METHOD, IN WHICH BUSINESS IS TRANSACTED BY THE APPELLANT AND OTHER WALL STREET BANKS WITH STOCK BROKERS, IS INCONSISTENT WITH THE EXISTENCE OF THE MUTUAL INTENTION, THAT THE BANK WAS TO HAVE A LIEN ON SECURITIES, OBTAINED WITH THE PROCEEDS OF THE LOAN.

According to the testimony, the daily loans made by the banks to brokers are always paid off in

cash before the end of the day on which the loan is made. This is true, even if the securities, obtained with the proceeds of the loan, have not been sold or otherwise disposed of by the brokers (pp. 228, 230, 222, 252, 267, 268, 121). It is the evident intention of the parties that the loan shall be paid in cash. It is immaterial to the bank with what funds the loan is paid, so long as it is paid by the broker (pp. 234, 256, 266, 267, 228, 121).

If the agreement were, as contended by the appellant, that the bank in each case was to have a lien on securities obtained with the proceeds of the loan, then the broker should, merely, turn over to the bank at the close of the day the said securities, or the proceeds thereof. The fact, that he always does, and is expected to, pay for the loan in cash, is inconsistent with the existence of an agreement, such as the appellant claims.

If, at the end of the day, a broker has not the cash to pay the loan obtained by him in the morning, *he does not deliver to the bank the unsold securities, obtained by the use of its money, but obtains a new loan on collateral and pays off the loan of the morning by check* (pp. 83, 220, 222, 268). He is expected to get this loan from some bank other than that, making the day loan, and not to force loans on the bank (p. 222). The collateral, used in securing the new loan, is not necessarily the securities, obtained by the use of the bank's money but is any collateral, satisfactory to the bank (pp. 268, 230). This again is inconsistent with the claims of the appellant, that the securities, obtained by the use of the bank's money, are to be turned over to the bank, as security for the morning loan.

Furthermore, if such an understanding existed, we should expect the banks to keep the moneys, loaned to the brokers, separate from the other moneys of the brokers, on deposit with them, and

to insist, that the brokers keep separate account of the said moneys and of the securities obtained by ~~by~~ the use thereof. The admitted practice, however, is, in each case, that the bank credits the moneys, loaned to the broker by it, in the same account with the other moneys of the broke on deposit with the bank (pp. 80, 228, 255). When the broker subsequently pays for his securities by drawing a check against his said account, it is impossible to tell whether he is paying for said securities with the money borrowed from the bank, or with his other moneys.

This state of facts is not brought about by any wrongful action on the part of the broker. The bank voluntarily does business this way. If there were any agreement that it was to have a lien upon the securities obtained by the use of the day loan, the bank would not make it impossible for the agreement to be effective by thus mingling the moneys loaned with the broker's other moneys. If the intention were to create a lien on the proceeds of the loan, it would not only keep the loan separate itself, but it would insist that the broker keep a separate account of the moneys borrowed and of his use thereof.

It does not, however, expect or require him to do so. On the contrary, the broker, with the knowledge and acquiescence of the bank, treats the securities acquired by the use of the daily loan as his own, free from any lien (pp. 267, 233, 255).

All this negatives the existence of an understanding, that the bank is to have a lien on securities, obtained by the broker by the use of the money borrowed or on the proceeds thereof.

The nature of the broker's business is entirely inconsistent with the position taken by the bank. It must be remembered that, on each day, he must pay out large amounts for the securities purchased, and deliver quantities of securities against sales,

made by him; that, in so doing, he is not dealing with securities, which belong to him, but that he is acting on behalf of his customers and with the property of his customers. *In some instances, where he has purchased securities, the customers already have a credit with the broker sufficient to pay for the securities purchased, or have theretofore delivered to the broker the securities sold. The broker, when he borrows the money from the bank each day, uses it, indiscriminately, to pay for the securities thus purchased for his customers, yet, as the securities, thus obtained, are the property of his customers, he has, in many cases, no right to pledge the same with the bank. He has no right at all to pledge the securities, which have been already paid for, nor to pledge those, which have been only partially paid for, in general loans, with the securities of others, where the amount of the loan has no relation to the amount owing by the customer thereon.*

Douglas *v.* Carpenter, 17 App. Div. (N. Y.), 329.

Rothschild *v.* Allen, 90 App. Div. (N. Y.), 233.

Thompkins *v.* Morton Trust Co., 91 App. Div. (N. Y.), 274.

Strickland **v.** Magoun, 119 App. Div. (N. Y.), 113.

The bank knew this. It knew that it was dealing with a broker, not with the owner of the property, and therefore knew that the broker could not legally make such an agreement, as is contended for in this case. Even assuming that the securities belonged to the broker, and he had a right to pledge them, it further knew that he must of necessity redeliver the securities, obtained by him, in the performance of contracts of sale, and deal with

them generally as though they were his own property. It permitted him so to do, thus admitting that it had no agreement with him such as is now contended for.

The learned Master, in his opinion, at pages 298-302, clearly sets out the nature of the broker's business, showing that it is necessary for him to have the use of the stocks for the purpose of making deliveries thereof, and that the banks making the day loan permit him so to do, and that all that they require is, that the loan shall be paid each day. He sums it up as follows (p. 300):

> "In other words, the result of the day's transactions leads to payment of day loans and not to their security, and such is the understanding and intent of both borrower and lender."

The learned Master further says (p. 301):

> "I am unable to see how the day loan could be of any benefit to the broker, unless, as the stipulation 'states' the securities obtained by the day loan 'were freely and at all times used by him' (the broker), to make deliveries on sales made in the course of his business, or were used as collateral in new demand or time loans, or were substituted for other collateral then in demand, or time loans."

A careful consideration of the method, in which the business is transacted and of the necessities of the business of the brokers, shows that the bank, in each instance, in making the loan, does not do so upon the securities. It makes the loan without collateral because it wants the broker's other business. It knows that the broker needs money daily in order to carry on his business and that he must repay the money each day to the bank, if he is to continue in business. The moment he makes a

default or loses his credit, his business is wrecked. The bank, knowing these facts, and making sure that it is dealing with a reputable concern, is willing to run the risk of making a temporary unsecured loan. It is willing to trust to the good faith of the broker. In view of the fact that the loan must be paid the very day on which it is made, it is extremely unlikely that there will be any default.

E.

THE TRANSACTIONS BETWEEN THE APPELLANT AND FISKE & CO. ON JANUARY 19TH, THE DAY OF THE FAILURE OF FISKE & CO., ARE INCONSISTENT WITH THE EXISTENCE OF AN AGREEMENT, THAT THE BANK WAS TO HAVE A LIEN UPON THE SECURITIES OBTAINED BY THE USE OF ITS MONEYS AND THE PROCEEDS THEREFOR.

It is impossible to reconcile the action of Mr. Roe, the cashier of the appellant, when he called at the office of Fiske & Co., and obtained the securities in question, with the existence of such an agreement. He did not go to the office of Fiske & Co. and ask for the securities obtained by them through the use of the money, loaned by the bank, but he went there and asked generally for securities, not concerning himself with the source from which they were derived. He took anything, that was given him, without looking to see whence it had come into the possession of Fiske & Co. He did not require any accounting by Fiske & Co. as to their use of the money borrowed that morning from the bank.

If the agreement were that the securities, obtained with the money borrowed, were to be subject to a lien of the bank, we would expect him to ask Fiske & Co. to account for the moneys and to produce the securities obtained by the use thereof and upon which the bank claimed to have such lien. He

did nothing of the sort, however. He merely made a general demand for securities and took whatever he was given, thus demonstrating that the only right, which the bank had, was under the agreement to demand further security.

Another circumstance, which negatives the appellant's contention is that, according to its claim as set forth in the schedule annexed to the appellant's brief and marked "Appendix A," a portion of the money, borrowed by Fiske & Co. from the appellant on January 19th, was used to pay off a loan of $15,000, theretofore made by the appellant to Fiske & Co. and secured by 200 shares of U. S. Steel Common, 10 shares of Slows-Shef Steel & Iron Company, and 10 shares of Chicago & Alton. The bank, on payment of the said loan of $15,000, re-delivered to Fiske & Co. the aforesaid securities, which, in turn, were handed back to the bank, together with the other securities handed to Mr. Roe when he called at the office of Fiske & Co. at noon on January 19th.

If the agreement were that the bank should have a lien on these securities to secure the morning loan of $400,000, why did it surrender the securities to Fiske & Co. when the loan of $15,000 was paid? If it had a lien on these securities to secure the loan of $400,000, it would and should have retained possession thereof on payment of the loan of $15,000.

F.

CUSTOM WAS INADMISSIBLE TO VARY THE WRITTEN AGREEMENT BETWEEN THE PARTIES, AND THE APPELLANT COULD NOT PROVE AN AGREEMENT THAT IT SHOULD HAVE A LIEN ON SECURITIES IN THE POSSESSION OF FISKE & CO. BY PROOF OF A CUSTOM TO THAT EFFECT. PROOF OF CUSTOM IS NOT ADMISSIBLE TO VARY A CONTRACT OR TO MAKE A DIFFERENT OR ADDITIONAL CONTRACT OR CHANGE THE LEGAL RIGHTS AND LIABILITIES OF THE PARTIES AS ESTABLISHED BY LAW.

We do not dispute, that custom is admissible, to explain the meaning and intention of the parties to a contract, but we claim, that, in the case at bar, it was introduced in an attempt to change the legal status of the parties and that the appellant was seeking, by proof of alleged custom, to secure for itself equitable rights in certain property of Fiske & Co., which rights were not given it by law or by the contract. We do not admit, that the alleged custom, if proven, would have had that effect, but assuming in this point, for purpose of argument, that it would, we contend that proof of custom was not admissible for that purpose.

The law is well established, that custom cannot be proved to alter a contract or change the legal status of the parties.

The proof of custom herein was not introduced for the purpose of explaining the meaning of the contract or the intention of the parties, but for the purpose of varying the contract made between the parties and of making a different or additional contract and changing the legal rights and liabilities of the parties as established by law.

As stated in the case of *The Delaware* v. *The Oregon Iron Co.*, 81 U. S., 579:

"Evidence of usage is admissible in mercantile contracts to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a particular sense and different from the sense which they ordinarily import, and it is also admissible in certain cases, for the purpose of annexing incidents to the contract in matters upon which the contract is silent, *but it is never admitted to make a contract or to add a new element to the terms of a contract previously made by the parties.* Such evidence may be introduced to explain what is ambiguous, but it is never admissible to vary or contradict what is plain. Evidence of the kind may be admitted for the purpose of defining what is uncertain, but *it is never properly admitted to alter a general rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law.*" (Italics ours.)

See also:

Barnard v. *Kellogg*, 10 Wall (U. S.), 383.
First National Bank v. *Burkhardt*, 100 U. S., 686.
Thompson v. *Riggs*, 5 Wall (U. S.), 669.
Oelricks v. *Ford*, 23 How. (U. S.), 49.
Hopper v. *Sage*, 112 N. Y., 530.
Markham v. *Jaudon*, 41 N. Y., 235.
Minnesota Rway. v. *Morgan*, 52 Barb. (N. Y.), 217.

The bank and Fiske & Co., furthermore, in this case did not rely upon a custom. They rather chose to define their rights and liabilities in a written agreement. If a custom existed, by omitting it from their agreement, they expressly elected that it should not apply to transactions under the agreement.

POINT II.

The appellant failed to prove that any of the securities and moneys, deliverd to it on January 19th, were obtained by Fiske & Co. through the use of the money borrowed by them from the appellant.

At the trial of this action, the appellant did not offer any proof to show the connection between the securities and moneys transferred to it and the $400,000 borrowed from it by Fiske & Co. on January 19th. It has, however, by great ingenuity, worked out two schedules contained in its brief (Appendices A and B thereof), which are based upon the entries in the books of Fiske & Co., which were offered in evidence by the appellees and received in spite of the appellant's objection.

The appellant now claims that these schedules prove that the securities and moneys transferred to it were obtained by the use of the money borrowed that day from it. We contend the entries do not prove this. We shall not, however, go into this matter in detail, except to point out two very material omissions or faults in the proof.

The appellant assumes that, in every case, where stock was obtained by a check drawn on the appellant bank, that check necessarily represented a portion of the $400,000, borrowed by Fiske & Co. from the bank on the morning of the 19th. Such, however, is not the case. On the morning of the 19th, before the loan was made, Fiske & Co. had on deposit with the bank over $36,000. Thereafter, the loan was credited to the same account, and, when Fiske & Co. drew checks against said account, it was impossible to tell whether the checks,

so drawn, were drawn against the moneys loaned to Fiske & Co. on the morning of the 19th or against the moneys previously deposited by them with the bank. It is, therefore, impossible to tell whether any particular securities were purchased with money borrowed from the bank, or other moneys of Fiske & Co. There is, therefore, no sufficient proof that the securities, delivered to Mr. Roe on January 19th, were securities purchased with the money borrowed from the bank.

The appellant did not claim, in its briefs either before the Special Master or the courts below, that it had traced the sources of the checks comprising the deposit of $54,048 18. It merely claimed the right to hold the said money upon the principle of set-off. It annexes to its present brief, however, a schedule (appendix B), by which it seeks to trace the source of the said deposit. It is clear, however, from the said schedule, that many of the securities, the proceeds of the sale of which are claimed to form part of the deposit, were, according to the appellant's own statement, obtained by Fiske & Co. by checks drawn on the Mechanics' Bank prior to January 19th (see 6th column of said appendix, page 116, of Appellant's Brief).

Obviously, the securities, paid for or released by checks drawn prior to January 19th, that is, prior to the making of the loan of $400,000, cannot be said to have been traced to the said loan, or to represent the proceeds of securities, obtained by the use of the said moneys borrowed on the 19th.

The appellant admits, in its brief, it cannot trace over $5,000 of the alleged deposit and ten shares of Interborough-Metropolitan stock. Without proof, that the securities and moneys, transferred to the appellant on the 19th, were obtained by the use of the money, borrowed by Fiske & Co. on that day, the appellant must utterly fail to its defense. Even

if it were an express intention, that the appellant bank should have a lien on the securities obtained by the money borrowed from it, such intention would not avail the appellant, because of its failure to connect the said securities and moneys with the said loan.

POINT III.

Even if the mutual intention and agreement in this case were that the appellant was to have a lien on the securities or the proceeds thereof obtained by the use of the money borrowed from it, such agreement was ineffective and void, because it was too vague and uncertain in character and because of the manner in which the transactions between the bank and Fiske & Co. were had.

It was unnecessary for the Master and the Courts below to pass upon the above point, as they found the custom and agreement, claimed by the appellant to exist, was not proved by it. This finding of fact disposed absolutely of the defense herein.

As we believe this Court will agree with the Special Master and the courts below in respect to the said finding, we shall only set forth the following propositions of law briefly. We do not, however, wish the Court to infer from this that we do not place reliance upon the said points and are not convinced of the soundness thereof.

A.

In order for a valid, equitable lien to exist, there must be, not only a clear mutual intention, that one party shall have a lien on the property of another, not delivered to him, but it must be the present intention to create a lien. An agreement to give a lien or security in the future is not enough. The transaction must be judged, as of the time the lien is actually created.

Re Dismal Swamp Contracting Co., 135 Fed., 415.
Mathews v. *Hardt*, 79 App. Div. (N. Y.), 570.
Re Faulhaber Stable Co., 170 Fed., 68.
Re Klingaman, 101 Fed., 691.
Zartman v. *First Nat. Bank*, 189 N. Y., 267.
Ryttenberg v. *Schefer*, 131 Fed., 313.

In the case at bar, if there were any intention, that the bank should have any lien on the securities obtained by Fiske & Co. with the use of the money borrowed, it is clear, that such lien was only to exist and be effective, if Fiske & Co. failed to pay the loan in cash. The distinct understanding was that the loan was to be paid in cash, and that the securities were not to be forced on the bank. Therefore, it was without present consideration and voidable as against the trustee.

Johnston v. *Huff, Andrews & Mayler Co.*, 133 Fed., 704.

B.

There cannot be an equitable lien, unless the property, which is to be subject to such lien, is designated and identified and appropriated to the use of the lienor.

Adams v. *Citizens' Bank of Tina*, 84 Fed., 270.
Re Dismal Swamp Contracting Co., 135 Fed., 415.
First Nat. Bank of Holdrege v. *Johnson*, 10 Am. Bkpcy., 208.
Lighthouse v. *Third Nat. Bank*, 162 N. Y., 336.
Hazenwinkle Grain Co. v. *McComb*, 116 Ill. App., 541.

There was no such separation and identification in the case at bar. The securities in question were not yet in the possession of Fiske & Co. when the loan was made; nothing was said or done by Fiske & Co. to indicate what, if any, securities were to be obtained by them with the money borrowed; Fiske & Co., according to the appellant's answer, would use the money to meet any "current obligations" (p. 20); this would include general office expenses; *the moneys were mingled by the bank with other moneys of Fiske & Co. This was done by the bank itself and was not a wrongful act on the part of Fiske & Co.*

It was impossible to tell, if the securities were purchased with the money, borrowed from the bank, or not.

There was no appropriation of the property, over which the equitable lien or right was claimed, to the use of the bank. All securities coming into the hands of Fiske & Co. were intermingled and treated by them as their own. The proceeds of the securities, when disposed of, were not absolutely assigned to the bank. Even if there had been a promise on the part of Fiske & Co. to pay the bank out of the proceeds of the securities obtained by them during the day, this would not constitute an appropriation of the money to the use of the bank, such as is necessary for the creation of an equitable assignment or right, such as was claimed by the bank.

Christmas v. *Russell's Executors,* 14 Wall (U. S.), 69.
Re Faulhaber Stable Co., 170 Fed., 68.
Wright v. *Ellison,* 68 U. S., 16.
Burke v. *Child,* 88 U. S., 441.
Torrance v. *Winfield Nat. Bank,* 71 Pac., 235 (11 Am. Bkpcy. Rep., 185).
Smedley v. *Speckman,* 157 Fed., 815.

Pettibone v. *Thomson*, 12 *Misc.* (N. Y.), 486.

C.

Even, if the intention was to create a lien, such lien was fraudulent as against creditors, and voidable by the Trustee, for the reason that Fiske & Co. were to retain possession of the property, which was to be subject to the lien, together with the right to sell and dispose of the same and to treat it as their own. This is shown by the general method in which the business is done. A lien created under such circumstances, is fraudulent at law and voidable by the trustee.

Skilton v. *Codington*, 185 N. Y., 80.
Re Liberty Silk Co., 152 Fed., 844.
Re Garcewich, 115 Fed., 87.

D.

Any agreement, expressed or implied, between the parties, for the creation of an equitable lien herein, was waived. The various acts of the parties, inconsistent with the existence of an agreement for a lien, heretofore pointed out, constitute a waiver of any agreement for a lien.

These acts are briefly as follows: The crediting by the bank of moneys borrowed to the general account of the broker, thus mingling them with his other funds; the insistence of the payment of the loan in cash; the making of new loans to the broker, when he did not have the cash to pay the day loan, instead of the acceptance of the stocks as security for the day loan; the fact that the bank permitted the brokers to intermingle stock obtained by them from all sources; the failure of the bank to make the brokers keep a separate account of the

moneys borrowed; the fact that the loans could be paid with any funds; and the general manner in which business is conducted.

All these facts show that, whatever the parties may have originally agreed to or whatever may have been their original intention, they, in their practice, departed therefrom. We must judge the transaction by the actions of the parties, and, if the actions are contrary to the agreement, they constitute a waiver thereof. The actions show that there was no equitable lien.

E.

Appellants' Cases Reviewed.

The cases of Sexton v. *Kessler & Co., 225 U. S., 90, and Hurley* v. *Atchison, Topeka & Santa Fe Ry. Co., 213 U. S., 126, and the other cases cited by the appellant do not sustain its contention.*

Neither of the above named cases, cited by the appellant, as supporting its proposition, has any application to the case at bar, because the facts in those cases are entirely different from the facts in the case at bar.

The decision in the case of Sexton v. Kessler, *supra*, was based upon the fact, that an agreement had been made long before the insolvency, by which the New York firm had set apart certain specified securities for the benefit of the English house, its creditor. The creditor had been notified that the debtor had placed in its safe certain named securities, as a protection against the latter's drawings. The only question considered was, whether the continued physical power of the New York firm over these securities and its right to withdraw and substitute, admittedly reserved, were inconsistent with the title or lien of the English house, and the

Court held that an equitable lien was created, and when the English house took the securities, it only exercised a right, that had been created before the bankruptcy and in good faith *by express contract.*

In the case at bar there was no contract and the property, upon which the lien is claimed to exist, was indefinite.

The appellant argues that it was possible to trace out the securities, upon which a lien is claimed to exist, and that the transaction is, therefore, the same as if they had been separated. However, in the Kessler case, the separation of the pledged property from the other property of the bankrupts was complete. Even though substitution was permitted, there were ~~also~~ certain securities held separately and not used by the firm in the course of its business.

In the case at bar, the bankrupts, with the knowledge and acquiescence of the bank, used the property, upon which a lien is claimed in the ordinary course of their business, mingling it with their other property and treating it as if it were free from the lien.

In the Sexton v. Kessler case, the Court said, at page 98:

> "So, a general promise to give security in the future is not enough, but the present was a more limited and cautious dealing. It was confined to specified identified stocks and bonds on hand and purported to give an absolute present right, qualified only by possible substitution and perhaps by a right of partial withdrawal, if the remaining securities had risen sufficiently in value. It purported not to promise, but to transfer."

In the case at bar, even admitting, for the sake of argument, that the agreement by custom was to give a lien, there were, as above shown, no speci-

fied securities set apart for the bank and separated from the rest of the bankrupt's property. The transaction, at the most, was a general promise to give security in the future. It purported to promise, not to transfer.

The distinction between the case of Hurley v. Atchison, Topeka & Santa Fe Ry. Co., *supra*, and the case at bar, is well pointed out by Judge Hand in his opinion in Hotchkiss v. National City Bank (page 345 of the record herein):

> "The money which the road paid in advance for the coal was the purchase price of an agreed quantity of coal actually in existence. It was meant to give the road the right to demand from the seller a certain amount of coal in its possession, which, though not yet set apart from bulk, was still definable in quantity. There was a specific interest in the res which survived bankruptcy."

The case is entirely different from the case at bar, where the transaction was a loan and the subsequent giving of the security.

A careful reading of the case of Hurley vs. Atchison, Topeka & Santa Fe Ry. Co. makes this distinction very clear, for Justice Brewer, in his opinion, clearly points out that the transaction is not to be considered "as one of an independent loan of money to the coal company," but that a purpose was implied that the coal as mined should be delivered, and, from an equitable standpoint, was to be regarded as a pledge of unmined coal to the extent of the advancement. Furthermore, in the Hurley case there was an express agreement that the railroad company was to have a lien. There was no such agreement in the case at bar.

In the case of Goodnough Mercantile & Stock Co. v. Galloway, 171 Fed., 940, an agreement had been made long prior to the bankruptcy, by which

the creditor was given security upon the timber in the trade, the logs cut therefrom and the lumber manufactured from such logs, and the Court in its decision enforced the equitable lien thus acquired.

In that case, the agreement to give a lien was found to exist, and the property, upon which it was to be exercised, was definite and fixed.

In the case of Hauselt v. Harrison, 105 U. S., 401, there was also an agreement, entered into long before the bankruptcy, and at the inception of the dealings between the parties, in and by which it was agreed that all the skins, before delivery of possession to Hauselt under the contract for the purposes of sale, should be considered as security for advances made by him, and the Court's holding was, that such agreement created a charge upon the property, not in the nature of a pledge or mortgage, but as a lien good between the parties, without a change of possession, even though void as against subsequent purchasers in good faith without notice, and creditors having executions or attachments, and, if followed by a delivery of possession before the rights of third parties intervened, it was good absolutely. It was further held that Hauselt could, by an action in equity, have prevented Bayer, from making any disposition of the property inconsistent with his obligations under the contract, and the Court, in order to protect the interests of Hauselt, could have placed the property in the custody of a receiver, with authority to finish the unfinished work, and, ultimately, by a sale and distribution of the proceeds, adjust the rights of the parties.

In Mills v. Virginia-Carolina Lumber Co., 164 Fed., 168, the decision was based also upon the fact, that an agreement had been entered into between the parties long prior to the bankruptcy, by which the party, advancing money, became entitled to an

equitable lien upon as much of the produce of the mill, as it had paid for.

It will thus be seen that in all the cases cited by the appellant in support of its claim, there was found to have been an agreement executed long before the bankruptcy, under which the creditor became entitled to an equitable lien upon the property or fund coming into the hands of the trustee in bankruptcy, and there was no question, but that the agreement had been made in good faith and was not merely a matter of form, or that the creditor had waived its rights by its method of dealing with the debtor. The property itself was also fixed and definite.

In the case at bar, the essential element of such an agreement made at the time of the transaction, or the existence of any facts or any ~~cause~~ of dealing from which such an agreement could be implied, is wanting, as we think we have successfully shown in our review of the facts. The property upon which the lien was to exist was not clearly defined, and the acts of the parties were inconsistent with the existence of the lien claimed.

F.

The case of Adams v. *Citizens Bank of Tina*, 84 *Fed.*, 270, *is directly in point and is a complete answer to the appellant's contention.*

In that case, Parsely & Markwell of Tina, Mo., partners, were engaged there in purchasing and shipping live stock for sale to the Chicago market, shipping mainly to Adams & Burke.

Parsley & Markwell were accustomed to pay for live stock which they purchased, by means of checks, which were *commonly over-drafts* upon the Citizens Bank of Tina, the bank being reimbursed by the net proceeds of sales, which, un-

der instructions to that effect from Parsley & Markwell, Adams & Burke were accustomed to deposit with the Drovers Bank of Chicago to the credit of the Citizens Bank of Tina, for the use or benefit of Parsley & Markwell. Parsley & Markwell purchased from Allamong & Sons a number of cattle for $8,012, and gave in payment a check on the Citizens Bank, which credited Allamong & Sons with the amount and thereby paid them. Adams & Burke had notice that the bank paid the purchase price and their agent, Lovell, in response to the bank, stated that the cattle would sell at Chicago for more than the amount of the check; that the live stock would be consigned to his principals, Adams & Burke, and that the proceeds would be deposited as usual to the credit of the Citizens Bank.

Thereupon, the Citizens Bank paid Allamong & Sons. Adams & Burke applied a portion, namely, $5,000 of the proceeds to pay a note of Parsley & Markwell and deposited only the balance. Suit was brought by the Citizens Bank against Adams & Burke for $5,000 on the theory that the bank had an equitable lien.

Held, the bank had no equitable lien on either the stock or the proceeds.

Woods, J., at page 272, said:

> "The case decided in *Bank* v. *Gillespie*, 137 U. S., 411, 11 Sup. Ct., 118, is broadly different from the present case. 'In equity' it was there said 'the Gillespies may properly be considered the owners. They paid for the cattle; the orders for possession, equivalent to bills of sale, were in their name; they controlled the shipments; and until their money advanced and stipulated profits were realized, they were equitably the owners and in control.' No such situation is disclosed here, either by averments or by proof. The Citizens

Bank, instead of being in the position of the Gillespies, did not pay for the cattle, did not receive bills of sale, or the equivalent, did not control the shipment, and, instead of being the equitable owners of either cattle or proceeds, had simply the legal liability of Parsley & Markwell to repay the money advanced by the bank, in accordance with their agreements made four or five years before, when they commenced business, that the bank should pay their checks given for stock purchased and they would 'have the proceeds come back to the bank.' That in effect was to extend credit to Parsley & Markwell, and not to create a lien or equitable interest for the benefit of the bank, either in the live stock purchased or in the proceeds thereof. The inference that no more than this was intended by the parties is further justified by the consideration that Parsley was a man of affairs in close relations with the bank, and that in the course of business adopted, whereby the bank was accustomed to receive prompt notice of sales and of the deposits made of the proceeds, it would receive timely information of any disposition of the proceeds of a sale contrary to the agreement or custom, as it did in the instance complained of."

At page 273:

"In respect to the particular shipment in question, while it appears that the bank made inquiries of Lovell and obtained of him statements, which, if he had the requisite authority to bind them, might be deemed to show an agreement by Adams & Burke to deposit in the usual way the proceeds of the pending consignment, it is to be observed that Parsley & Markwell were not present, nor, so far as it appears, cognizant of what was said between the Cashier of the bank and Lovell :and without their participation it would seem to have been impossible that,

by reason of anything said by Lovell, the bank should have acquired a special interest in the proceeds of the transaction. Besides it is evident on the averments of the bill that whatever assurances Lovell gave was a matter of opinion based on the custom of business and was not a promise that the proceeds of this consignment should be deposited to the credit of the bank. The bank relied on no such promise, but solely, as it is alleged, 'upon the good faith theretofore observed by Adams & Burke.' It is beyond question that the Cashier, who acted for the bank in the premises, expected that the proceeds of the consignment would be deposited to the credit of his bank, and that Lovell knew of that expectation; but it is, at the same time, true that the bank had no lien upon the cattle or control of the shipment, and therefore, had no equitable ground for pursuing the proceeds of the sale into the hands of Adams & Burke, who applied the amount in controversy to the payment of an obligation which they held against Parsley & Markwell, who had authorized the application."

POINT IV.

The transfer of the moneys and securities in question constituted a voidable preference under the provisions of the Bankruptcy Act.

A.

THE FIRM OF J. M. FISKE & COMPANY AND THE INDIVIDUAL MEMBERS THEREOF WERE INSOLVENT AT 12 O'CLOCK, NOON, ON JANUARY 19TH, 1910.

(1) *Introductory statement.*

This question of fact was fully tried before the Special Master and his finding in appellees' favor is found at page 284.

The Master was sustained in this finding by both lower courts.

Under well settled rules this finding should not be disturbed.

It would hardly seem to require argument now to demonstrate the correctness of this finding, in view of the fact that the firm suspended business at 12.40 P. M. of January 19th, and an involuntary petition was filed against them at 3.25 P. M. of the same day, and in view of the hopeless condition of the estate, as revealed by the testimony of Mr. Ernst, the Receiver, hereinafter referred to.

We are forced, however, to refer to the evidence on this subject somewhat in detail, because of the lengthy discussion, contained in appellant's brief.

The appellant premises its discussion of the proof on the question of the insolvency of J. M. Fiske & Company by a reference to the Bankruptcy Act, and the citation of a number of cases defining the word "insolvent" as used in the Act. There is, however,

no dispute in this case, as to the meaning of the word "insolvent." The definition of the word, as given in the Act, as construed by the Courts, and as set forth in the appellant's brief, was recognized by the appellees, when they proved their case, and by the Special Master and both the lower Courts, when they decided in the appellees' favor.

The appellees, in proving the insolvency herein, have also followed the rule quoted at page 74 of the appellant's brief:

> "Fair valuation is not what property would bring at a forced sale. The valuation used as a test must relate to the conditions existing in respect to the bankrupt's business as a going concern, at the time when the preference was given."

The proof offered by the appellees herein was directed to showing the valuation of the assets of the bankrupts, as a going concern, at the time of the transfer, to wit, 12 o'clock, noon, on January 19th.

The assets of the bankrupts, as is usual among stock brokers, consisted chiefly of stocks and other securities and accounts payable to them. The value of stocks and securities to a stock brokerage firm is naturally their value upon the "exchange" and the "curb." It is there that all the brokers' dealings are had. Whatever stocks may be worth to others, in the business of stock brokers, there is only one test of value, and that is the price shown by the ticker. The value of accounts due them is naturally figured, as in any other business. It is based, among other things, on the probability of their being collectible in the usual course of business.

(2) *Insolvency according to face of assets.*

The condition of the firm of J. M. Fiske & Company at 12 o'clock on January 19th, the time at which the securities and moneys in question were delivered to the bank, was, that it had liabilities of $904,570.02, and assets of the *face* value of $745,919.48. This appears from the testimony of Mr. Morse, the Accountant (p. 171).

Mr. Morse's testimony as to the liabilities was based upon the books of J. M. Fiske & Company. These books were shown by Mr. Humphrey, one of the members of the firm, who kept some of the books (pp. 36, 37) and who supervised the entries generally in all of the books (p. 38), to be correct and to show the financial condition of his firm (p. 33).

The bookkeeper, Isaacs, was also called, and also identified the books, and testified as to the correctness thereof (pp. 141, 139-141).

In the computation of the assets, Witness Morse took all the accounts shown on the ledger, with the exception of the firm accounts, at their face value (p. 173), and valued the securities on hand at their market prices at 12 o'clock on that day (p. 170). He took as a basis for his calculation, the market prices testified to by Mr. Oscar Bamberger, who was called, by the appellees, as an expert in regard to curb securities (pp. 147 to 151), the prices agreed upon by stipulation (pp. 151-157), and figured the price of Columbus & Hocking Coal & Iron at 58, which was the market price at 12 o'clock on that day, according to the testimony of Mr. Henry H. Cone (pp. 161, 162) (and see the allowance of $2,000 for the difference before and after twelve as agreed upon, p. 172).

(3) *The face value of $745,919.48 includes at least $443,833.55 uncollectible accounts.*

Mr. Morse testified that among the amounts

collectible, composing a part of the assets of the face value (p. 173) of $745,919.48, he had *included*, among others, the following accounts collectible, at their *face* value (pp. 173-175):

A. P. Morison Account	$34,732.69	
A. P. Morison Acct. No. 9.	34,292.40	
A. P. Morison Privilege Account	67,083.20	$136,108.29
Marcus Schnitzer		14,876.84
Pool No. 2, or 4/4 Account		152,642.79
C. M. Washburn	21,559.42	
C. M. Washburn, Special Account	4,422.71	25,982.13
John Felix		33,652.74
R. F. Little, Special	$14,269.72	
Account No. 1	13,973.84	28,243.56
G. T. Sullivan, Cotton Account	$5,840.00	
G. T. Sullivan, Grain Account	25,610.50	31,450.50
Sarah L. Stevens		3,817.20
Martha L. Stevens		3,836.21
Harry E. Stevens		4,348.83
Charles McLean		8,874.46
Making a total of		$443,833.55

Although these accounts, aggregating $443,833.55, were included at their face value by the accountant in his valuation of the assets of Fiske & Co. at $745,919.48, yet these sixteen accounts had no real value and should be eliminated in figuring the real value of the assets.

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A. P. Morison was called as a witness (pp. 146, 147) and testified that he was absolutely unable to pay his debts on January 19th. The fact, that the debt was uncollectible, is corroborated by the testimony of Mr. Fiske (p. 54), and further by the fact that this claim of $136,108.29 was subsequently settled by the Trustees for the sum of $10,000, which was to be paid by Morison in installments (p. 130).

The interest of Morison in certain mining and industrial concerns, referred to by the appellant in its brief, were all hypothecated. As a practical matter, the account was worthless (p. 147).

Marcus Schnitzer was called as a witness, and testified that, on January 19th, he had lost every dollar and nothing could be collected from him (pp. 121-125). This is corroborated by the testimony of Mr. Fiske (p. 58) and Mr. Wolf (p. 73).

The Pool No. 2 or 4/4 Account is shown, by the testimony of Mr. Fiske, to be a firm account (p. 55). Therefore, this claim should be eliminated from the list of assets.

The two claims of *Clifford M. Washburn*, amounting to $25,892.13, should also be eliminated from the assets, as Mr. Washburn was a member of the firm of J. M. Fiske & Company and was insolvent (pp. 261, 59).

It was shown by the testimony of Mr. Fiske and Mr. Wolf, that the debts of *John Felix* (pp. 55, 56, 72), R. F. Little (pp. 57, 72), and G. T. Sullivan (pp. 58, 74), were uncollectible on January 19th, and that *Charles McLean* had a good counterclaim for salary, which would wipe out the claim against him (pp. 58, 74). By the testimony of Mr. Wolf, it was proven that nothing could be collected from *Harry E. Stevens*, and that the accounts in the name of *Sarah L. Stevens* and *Martha L. Stevens* were in fact accounts of Harry L. Stevens (p. 74).

The appellant, in its criticism of the evidence, showing these accounts were valueless as assets, loses sight of the fact, that the test is, what was their value to a going business. Clearly they had none.

The aggregate amount of these bad accounts, less the amount to be received on the Morison settlement, is $433,833.55. If this amount is deducted from $745,919.48, the face value of the assets, the assets are reduced to $312,085.93.

(4) *Claim against James R. Keene.*

The only possible asset not included in the above calculations is the claim of J. M. Fiske & Co. against James R. Keene, upon which the Trustees of J. M. Fiske & Co. were, at the time this action was tried, suing Keene.

Its value was doubtful, in that the Trustees might not recover any sum whatever thereon. The greatest amount which the Trustees could recover, if successful in the Keene litigation, was fixed. According to Mr. Wolf's testimony, the maximum amount that could be recovered in the two Keene suits was $50,000 to $90,000 (pp. 273, 274).

The appellant says that this testimony, as to the value, is of little or no value. Such, however, is not the case. Mr. Wolf, according to the testimony, had had charge of the Keene litigation in behalf of the Trustees and, by reason thereof, was familiar with the facts out of which it arose and was qualified to state, as he did, the amount that could be recovered. The maximum amount was $90,000. This testimony is uncontradicted. Adding this amount to the assets of Fiske & Co., as already set forth, the total value of the assets of the firm of Fiske & Co. on January 19th at about 12 o'clock was about $402,086.01.

The contention of appellant's counsel, at page 72

of its brief, that the damages recoverable from Keene were $171,000, is not sound. The said actions brought by the Trustees against Keene were actions to compel Keene to account for secret profits, not actions for damages. Furthermore, the 9,740 shares carried by the bankrupts were not all owned by them. Some were carried for their customers. The number of shares carried by the bankrupts is not shown. The 6,000 shares, referred to in the complaint, were the shares Fiske & Co. were liable to take, if purchased by Keene. It is not alleged or shown that this number was purchased for or held by them on January 19th under the pooling agreements. Therefore, appellant's figures are without foundation.

(5) *Summary.* To sum up the foregoing facts, the following is shown to be the condition of the firm of Fiske & Co. on January 19th at twelve o'clock, the time of the transfer:

Face value of assets		$745,919.48
Less worthless accounts included in the foregoing assets	433,833.55	
		$312,085.93
Counting as an asset the claim against Keene at its greatest possible value	90,000.00	
Greatest possible actual value of assets		$402,085.93
Liabilities		904,570.02

There can be no doubt that at 12 o'clock on January 19, 1910, the time of the transfer, the firm of Fiske & Company was irretrievably and hopelessly insolvent. Its assets were not sufficient to pay fifty per cent of its liabilities. Not only was the firm insolvent, but the individual members thereof were all insolvent. This appears from the testi-

mony of Mr. Fiske (pp. 181-184), Mr. Sherwood (pp. 212-214), Mr. Humphrey (pp. 215, 216) and by the stipulation in regard to Mr. Washburn (p. 261).

The argument that Mr. Humphrey was solvent, because his personal debts were $440.41 and personal assets $1,000, is absurd, in view of the condition of the firm. He was liable for the firm debts.

(6) *As to the Hocking Pool.*

Appellant asserts the solvency of J. M. Fiske & Company, on the ground that J. M. Fiske & Company had, on their own or others' account, 9,740 shares of the common stock of the Columbus & Hocking Coal & Iron Company (p. 172), which stock at the opening of the Stock Exchange at 10 o'clock on January 19, 1910, was quoted at 88½, broke (p. 176), and by noon dropped to 60, a depreciation in market value of 28 points a share, claiming that there is no evidence that the financial condition of the Hocking stock changed materially between the hours of 10 and 12 o'clock, and that therefore the Hocking shares held by J. M. Fiske & Company are improperly figured at 60. The fallacy lies in this, that the value around 90 was not real, *but artificially created and deceptively maintained by a pool.* The lowest price for Hocking on January 19th was 25 (p. 272). If the 9,740 shares had been offered for sale at 12 o'clock on January 19th, there can be little doubt that they would not have brought 60.

Furthermore, the value of Hocking stock to a stock brokerage firm, as a going concern, was its market value on the exchange.

The appellant also errs in assuming, that it is proven, that Fiske & Co. were solvent on the morning of January 19th. The financial condition of J. M. Fiske & Co. on the morning of January 19

was not shown at the trial. The proof was directed to their condition at about 12 o'clock, and in computing the value of the assets at that time, the prices at which the Hocking and other stocks were selling on the New York Stock Exchange were taken as the market value, which is usual. Although the Hocking stock for a week prior to January 19 sold around 88 and 90, *that was due to a pool and manipulation by experts* (pp. 272, 275). (Pooling Agreements, Deft.'s Ex. C, D, E, F, G, H, I, J, K.) It is likewise true that after the Hocking pool broke and there was no further manipulation and "support," as it is called, of the Columbus & Hocking stock, the price dropped below 60, and for two weeks after January 19th ranged between 37 and 14 (p. 272). The greater values, around 90, were a semblance created for purposes of stock manipulation.

Assuming for the purpose of this argument, that appellant's contention that the 9,740 shares of Hocking should be valued not at the Stock Exchange price of 60, but at 88½, is sound, still J. M. Fiske & Co. were undoubtedly insolvent at noon on January 19th. Because, if by a valuation of Hocking at 88½, the assets be increased to the extent of $277,590 over the $402,085.93 mentioned, that is, if the total value of the assets of J. M. Fiske & Co. at noon on the 19th be increased to $679,679.25, these assets would be insufficient where the actual liabilities were $904,570.02.

(7) *Other evidence of insolvency.*

In addition to the evidence of insolvency above referred to, we have the fact that J. M. Fiske & Co. were petitioned into bankruptcy at 3.25 P. M. on January 19th, and subsequently adjudicated to have been bankrupts at that time (pp. 398, 375-

377). The importance of this, as showing their condition at twelve o'clock, noon, on said day, lies in the fact that the bankrupts practically stopped business at twelve o'clock, the announcement of their suspension reaching the "exchange" at 12.40 (pp. 42, 379).

Furthermore, Mr. Ernst, the Receiver, testified that the assets which came into his hands, did not amount to $200,000 (pp. 126, 127, 132, 157, 158, 400, 401). The amount of the claims filed with the referee is over $1,000,000 (p. 452). The excess of liabilities over the assets received by the Receiver is so great that, even allowing for the difference between the value of the assets to the bankrupts as a going concern and their value in bankruptcy, we must conclude that the bankrupts were insolvent at twelve o'clock, noon, on January 19th.

B.

THERE IS NO MERIT TO THE APPELLANT'S CONTENTION THAT THE PAYMENT OR TRANSFER WAS NOT IN SATISFACTION OR ON ACCOUNT OF AN ANTECEDENT DEBT.

The debt of the bankrupts to the appellant was contracted at ten o'clock of the morning of January 19th. It was then that they borrowed the $400,000. This is undisputed. At that time the bank got no security, as Mr. Roe states in his testimony, at page 120:

> "Q. You gave J. M. Fiske & Company credit on your books of $400,000 at their request on that morning? A. Yes.
>
> "Q. You credited that to their account? A. Yes, I credited that to their account.
>
> "Q. And they could draw their checks against it? A. Yes.

"Q. And at the time you made that credit you had no collateral security for that loan? A. There were no securities handed in at the time the loan was made.

"Q. Then you had none? A. No."

The transfer was made at about twelve o'clock. It was to secure and apply in payment on account of an indebtedness then existing.

The extract from Judge Ward's opinion, quoted by the appellant at page 77 of its brief, "that the loan and repayment the same day should be regarded as one transaction," has reference, not to the actual transactions herein involved, but to a supposititious case, that is, to the transactions as they might have been, had the contract between the parties been such a one, as is outlined by him in the preceding part of the paragraph, from which this quotation is taken.

It is needless to discuss here, whether the situation would be different, had there been an agreement, when the loan was made, that the bankrupts were to give the bank, as security, the stocks actually transferred to the bank at twelve o'clock, for, as shown elsewhere in this brief and as found by the Special Master and both of the lower courts, there was no such agreement in this case.

C.

THE EFFECT OF THE TRANSFER TO THE APPELLANT OF THE SECURITIES AND MONEYS IN QUESTION WAS TO ENABLE IT TO OBTAIN A GREATER PERCENTAGE OF ITS DEBTS THAN OTHER CREDITORS OF THE SAME CLASS.

There can be no question but that, if the bank is permitted to retain the securities and moneys transferred to it on January 19th, it will receive a greater percentage of its debt than other general

creditors. It will receive practically full payment of its claim and the other creditors will receive but a small percentage of their claims. *This is not disputed by the appellant.*

The appellant contends, however, that it is a creditor in a class by itself, because the bankrupts did not obtain so-called "clearance" loans from any bank other than the appellant, and that, for this reason, it did not obtain a preference over others of the same class. There is, we submit, no merit to this contention.

The test of whether two creditors are in the same class within the meaning of Section 60a of the Bankruptcy Act, depends solely on whether they should be classified alike in a distribution of the estate.

> "The words 'the same class' refer to the classes created by the Bankruptcy Act itself in prescribing the order of priority in the distribution of the general estate among creditors, as, for instance, taxes are in the first class, wages of workmen, clerks and servants are in the second class, and other priorities given out of insolvent estates by the state or federal laws are in the third class, and all other creditors constitute the fourth and last class."
>
> Remington on Bankruptcy, Section 1387.
> Swarts v. The Fourth National Bank, 117 Fed. 1.

The case, last above cited, discusses the decision of Grosscup, J., in re Harpke, 116 Fed., 295, cited by appellant, and shows the absurd results that would follow such a construction of the Act.

Clearly, the claim of the appellant does not come within any of the first three classes above set forth, but falls in the fourth class with claims of all other

general creditors, whether partially secured or not. To say that the appellant, as the only bank, which made daily unsecured loans to Fiske & Co., is in a class by itself, is as absurd, as to say that the claim of a dentist or of a butcher each belongs in a separate class, where only one dentist or one butcher has filed a claim.

D.

THE INTENT OF THE DEBTOR TO GIVE A PREFERENCE WAS CLEARLY ESTABLISHED IN THE CASE AT BAR. IT IS UNNECESSARY, THEREFORE, TO DECIDE WHETHER SUCH INTENT IS A NECESSARY ELEMENT OF A VOIDABLE PREFERENCE.

It is immaterial, so far as this case is concerned, whether the rule in Alexander v. Redmond, 180 Fed., 92, or that in Hardy v. Gray, 144 Fed., 922, should be followed, to wit, whether the intent of the bankrupts is immaterial, or whether such intent must be shown, because in the case at bar such intent was clearly established.

Assuming that the intent of the bankrupts is a necessary element in the case of a voidable preference, how must such intention be proven?

The question is answered by this Court in Toof vs. Martin, 13 Wall. (U. S.), 40, at p. 48, Mr. Justice Field writing the opinion, says:

> "It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of his proceeds to all his creditors, necessarily operates as a preference to him, and *must be taken as conclusive evidence that*

> *preference was intended,* unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy." (Italics ours.)

This principle was again recognized by this Court in Western Tie & Timber Co. v. Brown, 196 U. S. 502, at p. 508, where Mr. Justice White, writing the opinion, says:

> " * * * if Harrison, being insolvent, to the knowledge of the company, withi nthe prohibited period, gave the tie company authority to collect the sums due to him by the laborers for goods sold to them, with the right or even the option to apply the money to a prior debt due by Harrison to the company, the necessary result of the transaction would have been to create a voidable preference. And, if the inevitable result of the transaction would have been to create such a preference, then the law would conclusively impute to Harrison the intention to bring about the result necessarily arising from the nature of the act which he did."
>
> Citing Wilson v. The City Bank, 17 Wall. (U. S.), pp. 473, 486.

In the case cited in the opinion of Mr. Justice White, Mr. Justice Miller, writing for the Court, said (p. 486):

> "The general legal proposition is true, that where a person does a positive act, the consequences of which he knows before hand, that he must be held to intend those consequences.

So far as we have been able to find, this principle has never been departed from by this Court.

It is true, that, in some of the circuits, opinions have been written, which would seem to disagree with this principle, but, when they are analyzed, it will be found that the disagreement is more a matter of terms than of substance.

In Hardy v. Gray, 144 Fed., 922, a case arising in the First Circuit, while Mr. Justice Putnam attempts to limit the effect of Toof v. Martin, *supra,* upon the theory that the decision in that case was modified and changed by other cases cited by him on page 925, he nevertheless admits the essential principle decided in the cases above cited and for which we are contending. At the foot of page 923 he says:

> "Thus, as the statutes now stand, so far as concerns any alleged preferences involved in these appeals, all artificiality has disappeared, and the word "preference," as well as the word "intended," must be read with their natural meaning, subject, of course, to the general rules by virtue of which, under certain circumstances, an act from which a result ensues may sometimes be held to contemplate and purpose the result."

With all due deference to the learned Justice, who wrote the opinion in Hardy v. Gray, we do not think his statement at page 925 is correct, that the expressions in Toof v. Martin, which it was claimed in that case supported the position of the trustees, were more than met in the later cases of Wilson v. The City Bank, *supra;* Grant vs. National Bank, 97 U. S., 80; Barbour v. Priest, 103 U. S., 293, and Stucky v. Masonic Savings Bank, 108 U. S., 74.

Wilson v. The City Bank we have already quoted from above, and it affirms the principle laid down in Toof v. Martin, that where a person does a positive act, the consequences of which he knows beforehand, he must be held to intend those consequences. Otherwise, the case is not in point.

So far as the question of intent to prefer was concerned, the point involved was, whether the bankrupts "had procured" a seizure of their property under execution with intent to prefer, by not resisting regular judicial proceedings, in which a judgment and levy on their property were obtained in a case where a debt was due and the bankrupts were without any defense to the action. Clearly, they had done nothing to "procure" a seizure of their property. There were no facts, from which an intent to prefer by procuring a seizure could be inferred.

In Grant v. National Bank, 97 U. S., 80; Barbour v. Priest, 103 U. S., 293, and Stucky vs. Masonic Savings Bank, 108 U. S., 74, the only question before the Court, in each case, was as to whether the creditor had such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency. The question of the *intent of the debtor* was not considered by the Court.

It is therefore apparent that Mr. Justice Putnam was not justified in his criticism or limitation of Toof v. Martin.

Nor does the case In Re First National Bank of Louisville, 155 Fed., 100, conflict with the principle, contended for and decided by this Court in the cases above cited. This case merely holds that the intention of the debtor to prefer cannot be presumed from the mere fact, that he is insolvent, *where he is continuing his business in the usual way and making payments without a thought of disparagement of other creditors, and with confi-*

fidence of the debtor, and may well suppose that in such a case, the creditor may share in the confidence of his debtor and may well suppose that the debtor, while paying him his debt in the common course of business, is acting without any purpose of giving special favors. In other words, the facts, affirmatively established in that case by the defendants, overcome and negatived the presumption, arising out of the bankrupt's insolvency.

From the foregoing discussion, it is clear that the rule established by the court in Toof v. Martin, *supra,* that "the transfer, in any case, by a debtor of a large portion of his property while he is insolvent, to one creditor, without making provision for an equal distribution of his proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. *The burden of proof is upon him in such a case, and not upon the assignee or contestant in bankruptcy.*" (Italics ours.)

Fiske & Co. were insolvent when they made the transfer. Under the above rule, their intent to prefer is conclusively presumed, in view of the fact that the appellant did not show any facts to overcome this presumption.

In the case at bar, it is not necessary, however, for the appellees to rest upon this presumption, arising out of the insolvency of Fiske & Co., in order to establish the debtors' intent, for the intent is affirmatively shown, by other facts, proven in this case.

On the morning of January 19th, the day upon which the transfer was made, Fiske & Co. were not in good condition, as is apparent from the number

of bad accounts and the general condition of their affairs, as described by the accountant. Their insolvency at noon, the time of the transfer, was caused, among other things, by the disturbance, that morning in the stock market and the break in Columbus & Hocking Coal & Iron stock. Their troubles had been accentuated shortly after the opening of the exchange that morning, when the market began to break, and had become serious before 12 o'clock. Not only did they know this, but it is apparent from the testimony of Mr. Roe, that, even before he left the bank to go to the office of Fiske & Co., seeking the securities, the financial troubles of Fiske & Co. had become a matter of notoriety (p. 86). It was a matter of general knowledge on his part and on the part of the clerks in the bank and upon the exchange (p. 87).

At the time of the transfer, Fiske & Co. knew that they were insolvent and that they could not continue business. Their announcement of this fact reached the exchange at 12.40 P. M. (pp. 42, 379). In addition to this, the very act of making the transfer showed their intention. They surrendered practically all the good securities held by them, thus rendering it impossible to continue business. (See Stock on Hand, pp. 382-384.)

Their intention is further evidenced by the facts and details surrounding the transfer itself, which will be hereinafter fully discussed in considering the question, as to whether or not the appellant had reasonable cause to believe a preference was intended.

E.

THE APPELLANT HAD REASONABLE CAUSE TO BELIEVE THAT IT WAS RECEIVING A PREFERENCE.

AS TO THE LAW.

We do not understand the force of the criticism, made by the appellant, of the finding of the Master, quoted on page 91 of its brief.

Eliminating, for the time being, the question of the bankrupts' intent, which has already been discussed, and dealing only with the attitude of the transferee—the principle of law laid down by the Master cannot be disputed and is admitted by the appellant on the subsequent part of its brief.

The appellant further states at page 91 of its brief:

> "We do not understand the rule prior to the amendment of the statute to have been that if A, being B's debtor, and knowing himself to be in a failing financial condition, should come to B, who was entirely ignorant of A's condition, and pay his debt, that recovery would be allowed on the ground of a preference, if A subsequently and within the statutory period fails. Yet, as we view it, this is practically what has been the result in the case at bar."

We do not contend and have never contended, that the law is as above stated, and we shall show that no such result was reached in the case at bar.

Before examining the facts, however, we shall state our understanding of the law.

We recognize, that, to determine whether or not the bank had reasonable cause to believe a preference was intended, it is necessary to examine,

whether it knew or had reasonable ground to believe that J. M. Fiske & Co. were insolvent.

In the case at bar, as already shown, the transaction was a preference and was intended by the bankrupts as a preference. The bank knew, that the result of the transfer would be to enable it to get a greater percentage of its debts than other creditors of Fiske & Co., if that firm were insolvent, for the transfer was without present consideration and enabled the bank to secure almost full payment of its claim. The question, therefore, whether the bank had reasonable cause to believe a preference was intended in this case depends entirely upon whether or not the bank at the time of the transfer had reasonable cause to believe Fiske & Co. were insolvent.

It is not necessary to show that the bank had actual knowledge, or even belief, but only reasonable cause to believe.

Pratt v. Columbia Bank, 157 Fed., 137.

A transferee has been held to have reasonable cause to believe a debtor is insolvent, if he had actual knowledge of the insolvency, or if he had actual knowledge of such facts as would convince a reasonable business man that the transferror was insolvent, or *if he had knowledge of such facts and circumstances as would induce a reasonable business man to make inquiry, which inquiry would establish insolvency, in the last event, it being held that a transferee is chargeable with knowledge of all the facts which an inquiry on his part would have disclosed.*

In re Louis A. Eggert, 102 Fed., 735.
Wager v. Hall, 16 Wall. (U. S.), 584.
Dutcher v. Wright, 94 U. S., 553.

Wright v. Wm. Skinner Mfg. Co., 162 Fed. 315.

Pratt v. Columbia Bank, 157 Fed., 137.

Schmidt v. Bank of Commerce, 25 Am. Bkpcy. Rep., 904.

McElvain v. Hardesty, 169 Fed., 31.

Alexander v. Redmond, 180 Fed., 92.

Coder v. McPherson, 152 Fed., 951.

Wright v. Sampter, 152 Fed., 196.

Stevens v. Oscar Holway Co., 156 Fed. 90.

In re Tindal, 155 Fed., 456.

Stern v. Paper, 183 Fed., 228.

In re Virginia Hardwood Mfg. Co., 139 Fed., 209.

Bardes v. First Natl. Bank, 122 Iowa, 443 (12 Am. Bkpcy. Rep., 771).

Crittenden v. Barton, 59 App. Div. (N. Y.), 555.

Huttig Mfg. Co. v. Edwards, 160 Fed. 619.

Brewster v. Goff Lumber Co., 164 Fed. 124.

In Re John J. Coffey, 19 Am. Bk. Rep., 148, 165 (not reported in Fed.).

The foregoing statement of the law is not in any sense in conflict with Grant v. The Bank, 97 U. S., 80, cited by appellant.

This is well pointed out in re: Louis A. Eggert, 102 Fed., 735:

> "The supposed conflict between these cases is imaginary, not real. In Grant v. Bank, and the cases subsequent in point of time, the Court was dealing with the facts spread upon the record, and did not find occasion to consider the facts and circumstances which, if

brought home to the creditor, would put him upon inquiry of his debtor's financial condition. In the cases antedating Grant v. Bank, the question of notice arose and was considered. The resultant of all these decisions we take to be this: That the creditor is not to be charged with knowledge of his debtor's financial condition from mere non-payment of his debt, or from circumstances which give rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor should have actual knowledge of, or belief in, his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; *that if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose.*"

Two of the earlier decisions referred to in the above quotation are Wager v. Hall, 16 Wall. (U. S.), 584, and Dutcher v. Wright, 94 U. S., 553, in which latter case the Court said, at page 557:

* * * "but if it appears that the debtor, giving the preference was actually insolvent, and that the means of knowledge were at hand, and that such facts and circumstances were known to the creditor securing the preference as clearly ought to have put a prudent man upon inquiry, it must be held that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have ascertained the fact to be so by reasonable inquiry."

Circuit Judge Sanborn, whose opinion, in the case of Powell v. Gates City Bank, is cited by the appellant at page 93 of its brief, in writing the opinion for the Circuit Court of Appeals for the Eighth Circuit, in Coder v. McPherson, 152 Fed. Rep., 951, states at p. 953:

> "Notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose."

See also Wright v. Wm. Skinner Mfg. Co., 162 Fed., 315.

The appellant at page 92 of its brief admits that "the rule unquestionably has been established that if a creditor accepts a transfer under circumstances which would lead a business man of ordinary prudence and sagacity to believe that he was being preferred by the debtor, without investigation, he will be charged with such knowledge of the debtor's intent as he would have acquired had he made such investigation, and in determining this fact each case must of necessity stand largely on its own feet."

The following quotation in Matter of John J. Coffey, 19 Ab. Bk. Rep., 149, at p. 165 (not reported in Fed. Rep.), expresses the established rule well and is particularly aplicable to the case at bar, as will appear when the facts are hereinafter discussed:

> "A debtor's fear about his credit should put a pressing creditor upon inquiry as to the situation of it and the necessity for it. He cannot neglect to investigate, be intent on security, and purposely ignorant and blind, or intend to be, of his circumstances, until after

he gets the security, and escape being held to have had reason to believe what the effect of the giving of it will be, which, under the Act of 1898, if enabling him to get more than other creditors, is an intended preference under Sections 60-a and 60-b, as was held in Benedict v. Deschel, *supra.*"

Furthermore, we must judge the transaction not only by what it was proved the transferee knew as to the insolvency, but we must take into consideration and can infer a belief that a preference was intended from unusual actions and methods on the part of the transferee in relation to the Bankruptcy Act.

Hanly vs. Gray, 144 Fed., 922.
McElvain v. Hardesty, 169 Fed., 31.

AS TO THE FACTS.

In the case at bar we contend that the evidence clearly establishes, not only that the cashier of the appellant bank had reasonable ground to believe a preference was intended, but that he affirmatively sought a preference; it further shows, not only that, when the transfer was made, he had knowledge of facts and circumstances, such as would have induced a reasonable person to make inquiries, which would have disclosed insolvency, but *he had then made up his mind and believed the firm to be insolvent.* His actions disclosed his knowledge and belief most eloquently and convincingly and are absolutely inconsistent with ignorance of insolvency.

The proof upon this point lies within a narrow compass. It is largely dependent upon the testimony of the cashier of the bank, an interested and adverse witness, and is as follows:

After the bank, on the morning of the 19th of

January, 1910, made the unsecured loan of $400,000 to J. M. Fiske & Co. upon their written request, there was a disturbance on the Stock Exchange; that is, there was a sudden change in the values of certain stocks in which J. M. Fiske & Co. were large dealers, and it became rumored around the "street" and in financial circles, that J. M. Fiske & Co. were "in financial trouble" (pp. 85-87). This reached the bank, and one of the clerks in the Receiving Teller's department, about twelve o'clock, informed the cashier of such rumors (pp. 85, 87, 92).

The Cashier must already have known the condition of the market, for he had a ticker in the office, and stated in his testimony that he knew there was a disturbance in the market that morning (p. 86). What occurred, when he was told of the rumors in regard to J. M. Fiske & Co. by the clerk, we can only gather from his own testimony, and, of course, we can hardly expect this Cashier, knowing his bank to be in danger of losing a large sum of money, if the taking of such property should be declared a voidable preference, to have a very good memory, as to what occurred between himself and the clerk, or as to the details of the conversation, which he states he had with Mr. Knowles, the Vice-President. The most he would admit was that he had reason to believe that the firm, who had that morning received a credit of $400,000, and who had not up to that time (about noon) made any deposit or sent in any securities of money, *was in financial trouble* (pp. 85-87).

When he learned this, however, did he, as would any ordinary prudent business man, investigate or make inquiry as to the condition of J. M. Fiske & Co.? Had he done so, he would quickly have learned that the firm was deeply interested in Columbus & Hocking Coal & Iron stock, and that, because of

the enormous decline in the price of that stock, the firm was hopelessly insolvent. He knew enough. He evidently *knew what financial trouble* meant to a Stock Exchange house, and especially to this Stock Exchange house. He merely looked to see how much Fiske & Co. owed his bank. He found that their checks to the amount of $276,000 had been certified that morning, and no deposits had been made. That was enough investigation for him (pp. 89, 87-89). He did not care to know whether Fisk & Co. owed others, or if they could pay others. His only thought was to stop further certification and payment of checks, and to get security or money for the bank quickly.

Yet, what was the necessity for haste, unless he were seeking to get ahead of other creditors? He knew that, if J. M. Fiske & Co. were solvent, the bank's loan would be paid before 3 o'clock of that day. That was the understanding and the custom. They had never before failed to pay a loan of this kind during the day, and in the elaborate alleged custom, testified to by the cashier and the officers of other banks called by the defendant, there is no provision for such an occurrence (p. 88). *No solvent stock brokerage firm ever fails to meet its obligations to a bank.* If J. M. Fiske & Co. were solvent, there was no cause for alarm, and no need of haste, for the loan would be paid by them that day. It is true they had not yet made any deposits against their withdrawals, although they generally did so before 12 o'clock, but there was nothing in this to cause alarm. If we may judge from the testimony of Mr. Carse, Vice-President of the Hanover National Bank, who was called by the defendant to testify as to the alleged custom, it was not unusual for deposits to come in sometimes as late as 2 or 3 o'clock (p. 220). Mr. Carse and the cashier of the appellant both testified that the usual

custom, if deposits were late, was to telephone the customer (pp. 220, 117).

Why didn't the cashier telephone Fiske & Co. to make a deposit? Evidently he believed that this was an extreme case. So he departed from what he had thus claimed to be the usual and established custom, and, without notifying J. M. Fiske & Co., took the extreme step of stopping at once all business with the firm absolutely.

Is it possible that he would, without a word to J. M. Fiske & Co., have taken this drastic move, which he knew meant instant and absolute ruin to their credit throughout the "Street," knowing that at any moment checks drawn by them would be presented for payment or certification and dishonored, unless he felt pretty confident that the condition of the firm was hopeless, and unless he was dominated by an overpowering desire to save the bank from loss?

We contend that this act of stopping payment and further certification of the firm's checks by the bank, after a hasty consultation between the witness and the Vice-President, speaks eloquently of what they both thought and knew of the situation.

Banks are conservative institutions; having given the firm credit of $400,000 that very morning, according to a daily custom which had continued for years, is it credible that, on that very same day, without waiting for the repayment of the loan, due on the afternoon of that very day, that without the most solid and substantial reasons that seemed to be both good and sufficient, they would thus cut off further honoring or certifying of the firm's checks, and that, too, without giving the firm a chance to make good? A bank, simply in doubt as to a firm's condition, would at least telephone the firm that, unless they sent over

moneys or securities within five or ten minutes, they would stop further payment and further certification of the checks, and they could easily delay certification for that short interval. Nothing of the kind here. The officers had heard enough. There is no other reasonable explanation; there is no other possible explanation of that radical act on the part of the bank, except that its officers were both satisfied from what they had heard that morning that the firm, in the parlance of the "Street," was already "busted."

Having thus stopped the account of J. M. Fiske & Co., the cashier dropped everything else, and with all possible haste, raced around to the firm's office at 42 Broadway, although he had never done such a thing in all the years the firm had been a depositor of the bank (pp. 82-91). When he reached the office, he saw Mr. Sherwood, a member of the firm (pp. 92-99). We can easily imagine what occurred at this interview, although Roe is again most secretive and his memory again faulty. He cannot tell us what actually happened there upon this extraordinary occasion, but he finally admits that he told Sherwood that he had heard that Fiske & Co. were in "financial trouble," and that Sherwood made an "evasive reply" (p. 94). Even this is a startling admission. Here was the cashier of the bank from which Fiske & Co., if they were to continue business, needed further credit, alarmed at the firm's financial condition, asking if the rumor as to the firm's financial embarrassment were true? Were Fiske & Co. solvent, Sherwood would not only have said so most emphatically, but would have gone to any trouble or expense to convince the bank of the fact. *He knew and the cashier knew that an "evasive answer" under these circumstances was confession. It was as definite and effective as sending the bank a written notice that the firm was bank-*

rupt. It was impossible for the cashier to mistake the meaning of such a reply.

The balance of the conversation with Sherwood was that there were deposits on the way to the bank, but the cashier had evidently lost all confidence in the firm of J. M. Fiske & Co., for he did not inquire the amount of the deposits, but insisted on having securities. Can this possibly be consistent with the idea that he did not know the firm was "through," especially when, as testified to by Messrs. Carse, Vice-President of the Hanover National Bank, and Alexander, Vice-President of the National Bank of Commerce, it was not customary for banks, in cases of loans of this character, to accept security or have further loans forced upon them, but to insist on payment of the loan in money (pp. 221, 240). He did not care what was customary, but wanted security—as much security as he could get—and he wanted it in a hurry. *He did not ask, if they were securities that had been taken up with the money borrowed that day from the bank.* He did not claim them under any contract or custom. He even took some securities upon which the bank could by no possibility claim a lien. He did not even take time to examine them, just glanced over them, put them in his pocket and hurried away without examining them, making a list of them, or giving a receipt (pp. 98, 99). Does this look like an ordinary business transaction? Is it the conduct of a man, who is merely a little uneasy, as to his debtor's condition? Certainly, it is most unusual, and it is only consistent with the idea that he felt convinced and knew that J. M. Fiske & Co. were insolvent and that he was willing to take everything and anything he could get for the bank. He felt that it would, at least, be so much saved the bank. He would be so much ahead of other creditors.

The unusual procedure in this case is in itself sufficient to raise the inference that a preference was intended, and brings this case within the rule stated by Remington on Bankruptcy, Sec. 1399, p. 827, that:

> "The resort to unusual method of payment or securing of payment will raise an inference of belief that a preference was intended."

See also

In re Andrews (135 Fed., 599).
McElvain v. Hardesty (169 Fed., 31).

That the appellant actually knew of the insolvency of J. M. Fiske & Co. becomes even clearer, when the case is viewed in the light of the cashier's further conduct.

On his return to the bank, he found that the deposit, that Mr. Sherwood stated was on the way around, had arrived, and amounted to $54,048.18. He had brought with him a large quantity of securities, which he had obtained without difficulty, and he had talked with Mr. Sherwood, a member of the firm, yet in spite of these facts, he was evidently not convinced that the firm was in a satisfactory financial condition, and in no danger of failure, for without waiting to have the securities listed, or knowing just what they were or their value, *he continued the instructions to his employees not to honor any more of the firm's checks, and ordered that the account be balanced.*

This action must convince us that he knew the firm was insolvent and would suspend business, for it is inconsistent with mere suspicion or doubt on the part of the bank.

Assuming, that the bank had been in doubt and had heard rumors and was simply uneasy, and be-

cause of this alone had taken the great responsibility of stopping further checks, what would have been its first step, when it found itself so much better off with the account than it was at the time payment was stopped? Three things had since happened: (1) a $54,000 deposit had been made; (2) the cashier had spoken with Mr. Sherwood, a member of the firm; (3) the cashier had obtained over $175,000 worth of securities. In other words, everything had happened to allay the bank's fears, were it uneasy. The duty of the bank if it did not believe the firm was insolvent was to restore its credit, which it had cut off so impulsively and without proper foundation.

Its first step would have been to restore payments of checks and certifications. It would have realized, that it had made a great mistake, which might prove disastrous to the firm, and it would not have lost a minute in rehabilitating the firm. Did it do anything like this? Not at all. It put the last nail in the coffin of the firm's credit by closing the account up entirely and forever. This last act of closing the account, viewed in connection with the stopping of payment, leads to the irresistible conclusion that the bank's officers knew thoroughly well what they were about, and that, when they received the securities and moneys and closed the bank "lid" on the firm of J. M. Fiske & Co., they knew the firm was "done."

That the action was justified is evident from the fact that at 12:40 of that day, the firm suspended.

The appellant contends that even though the bank, at the time it received the securities, had reasonable cause to believe a preference was intended, that this is not true of the sum of $54,048.18, which was received in money. There is, however, no distinction between the moneys and the securities, for the moneys did not arrive at the bank

until after the cashier had the conversation with Mr. Sherwood above set forth (p. 110), and until after the bank had knowledge of the facts, which, as already shown, must have convinced it that the firm of J. M. Fiske & Co. was solvent (pp. 312-13).

Under the foregoing facts and circumstances, there can be no doubt, that the appellees have proved absolutely that, when the bank received the securities and moneys in question, it had reasonable cause to believe that preference was intended, and, therefore, the transfer of the said moneys and securities to it constitute a voidable preference within the meaning of the Bankruptcy Act.

F.

There is no merit to the appellant's contention that the estate of Fiske & Co. was not diminished by the transaction and that therefore the transfer was not a preference.

The transfer herein did diminish the estate to the extent of more than $230,000, the value of the property transferred.

The case of Continental Trust Company vs. Chicago Title Company, 229 U. S., 435, has no application to the case at bar, as the facts herein show that the bank was a creditor of the bankrupts on the 19th of January, 1910, for money loaned to them, and, on that day, it received securities to which it was not entitled under any agreement, as collateral security for the debt, and to that extent the bankrupts' estate was certainly diminished.

In the Continental Trust Company case, *supra*, Mr. Justice Day clearly points out that had it not been for the co-operation of Anderson & Company, who took the place of Prince on the Board of Trade, substituting their securities for his and carrying out his obligations, the certificates would have had no value to the estate. It was only by the arrange-

ment made with Anderson & Company and their carrying out the deals of Prince that the certificates were cleared of any obligation to others and became payable to Prince. This being so, the Court very naturally held, that, what was done, did not in fact diminish the estate of Prince, otherwise available to creditors, for, if Anderson & Company had not taken Prince's place and carried out his deals, the traders holding the certificates would have had the benefit of the deposits. What was therefore done by Anderson & Company in no way diminished the estate of the bankrupt, and because it worked to the benefit of a creditor (the bank) was not sufficient to make it a preference, unless the estate of the bankrupt was thereby diminished.

The bank, in that case, clearly had the right of set-off, unless a violation of Section 68B was shown, and, inasmuch as the bank had not acquired any claim against the bankrupt with a view of setting it off on the certificates, but what was really done was the satisfaction, without diminution of the estate of the bankrupt, of possible claims of others, who, in the event of the bankrupt's default, would have been entitled to the deposits represented by the certificates, the bank was not deprived of its right of set-off. The learned Justice further indicated the position of the Court by saying, in summing up the situation:

> "What was done here, as we have said, consisted in procuring a broker to take up the trades of Prince, so that the certificates became clear of the rights of any third persons, and to do this without any diminution of the bankrupt estate."

The appellant, in seeking to apply the Continental Trust Company case to the case at bar, assumes

the existence of an agreement or custom, which we have hereinbefore shown does not exist. It also loses sight of the fact that in this case Fiske & Co. were in good credit when the loan was made by the bank. Had the bank not made the loan, Fiske & Co. could have secured it elsewhere.

In the case at bar, although the loan and the transfer were made on the same day, they were separate transactions just as distinct as if made a month apart. If the appellant's contention were correction, there never could be a preference if the money borrowed was used in the business of the bankrupts. If a person made a loan to a business man, and subsequently and within the statutory period and when he knew the man was insolvent, took security to the amount of the loan, the net result of the transaction would not have diminished the bankrupt estate any more than in the case at bar, yet the transfer would be a voidable preference.

The correct test is, Did the transfer diminish the estate? The estate, herein, was diminished by the transfer to the extent of more than $230,000.

POINT V.

The appellant has no right to set off the sum of $54,048.18, delivered to it by Fiske & Co., but the delivery of the said sum to the appellant constituted a preferential transfer which is voidable by the trustee.

The appellant has no right of set-off in regard to the sum of $54,048.18, transferred to it by the bankrupts, because the said sum was never received from Fiske & Co. or accepted by the bank as a deposit. The said sum was received by the bank after Mr. Roe, the Cashier thereof, had directed the Certification Clerk and the Paying Teller not to certify or pay any more checks drawn by Fiske & Co. He had closed the account and had gone to the office of Fiske & Co. to obtain some security for the amount owing by that firm to the bank. While he was there, the said sum of $54,048.18 was received. This was about noon on January 19th. It was immediately applied by the bank as a payment of a portion of the indebtedness of Fiske & Co.

It never constituted a deposit. As the account of Fiske & Co. had been closed prior to its receipt, there never was a moment when Fiske & Co. had a right to draw checks against the said sum. Therefore, the relation of debtor and creditor was never created by the receipt of this money by the bank. It was treated by the parties as, and constituted a payment, and, being made under the same circumstances as those under which the securities were delivered, constituted a voidable preference.

Schmidt v. *Bank of Commerce,* 25 Am. Bkpcy. R., 904.

Ridge Ave. Bank v. *Studheim,* 145 Fed., 798.

The cases cited by the appellant in its brief do not apply, because they all deal with the right of a bank to set off sums received as deposits against which the debtor, for a time at least, had the right to draw checks.

As already pointed out, the case at bar is entirely different, as the $54,000 was received as a payment. There was no longer any account to deposit in. The bank immediately reduced it into its own possession and applied it in liquidation of the debt of Fiske & Co. It was a payment.

POINT VI.

There was no error in the admission in evidence of the books of J. M. Fiske & Co.

The contention of the appellant, that the books of Fiske & Co. were improperly admitted, is ably disposed of by *Judge Hand* in his opinion herein (p. 348):

> "The exception to the admissibility of the books is not good. They were not put in evidence to prove the sale and delivery of any securities represented by any item contained in them, or the loan of any money, but to show whether the bankrupts were solvent or insolvent at a given time. If they were not admissible for that purpose, no one could be proved insolvent without proving separately every item of liability and every asset by common law proof. The law requires nothing of the sort, but allows anyone's books in evidence, even if not a privy, to show whether he is insolvent or solvent, upon proof that they are in fact his books, duly kept in his business, for the purpose of showing his financial condition, *Adams* v. *Bowerman*, 109 N. Y., 23. The authorities cited by the defendant are all cases where the effort was to use the books to show that an item therein contained in fact represented some transaction which was the basis of the action."

See also:

In re Docker-Foster Co., 123 Fed., 190; 28 Am. Bk. Rep., 867.

Hackney v. *Hargreaves Bros.*, 13 Am. Bk.

Rep., 164, 169 (not reported in Federal Reporter).

White v *Benjamin*, 150 N. Y., 258.

Furthermore, in the case at bar it was affirmatively shown that the books, offered in evidence, were correctly kept and showed the true financial condition of the firm.

Mr. Humphrey, one of the members of the bankrupt firm, who kept some of the books and supervised the entries in all of the books, testified that the books were correctly kept, that he went over the trial balances and checked them up, and that the assets and liabilities of the firm at 12 o'clock on January 19th, 1910, could be computed from the books (pp. 32, 33, 36-38).

Mr. Fiske, another member of the firm, who made some entries in the books, also testified (pp. 68-70), and the bookkeeper, Mr. Isaacs, identified the books and testified to their correctness (pp. 139-141).

Mr. Isaacs personally kept the ledger from which Mr. Moss, the accountant, made his computation.

Mr. Moss also stated (pp. 44-45) that he verified the correctness of the books.

In consideration of this question, it must also be remembered that the proof of the insolvency does not depend alone upon the testimony of Mr. Moss, but that, as heretofore stated, Fiske & Co. practically stopped business at the time the transfer was made at the bank. Their notification of this fact reached the stock exchange at 12.40 P. M., and the petition in bankruptcy was filed at 3.25 P. M. We also have Mr. Ernst's testimony as to the assets which came into his hands, which did not exceed $200,000 in value.

POINT VII.

The decree appealed from should be affirmed with costs.

DANIEL P. HAYS,
Solicitor for Appellees.

DANIEL P. HAYS,
EDWIN D. HAYS,
Of Counsel.

MECHANICS' AND METALS NATIONAL BANK OF THE CITY OF NEW YORK *v.* ERNST ET AL., AS TRUSTEES IN BANKRUPTCY OF HUMPHREY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 446. Argued October 20, 1913.—Decided November 3, 1913.

National City Bank v. *Hotchkiss*, *ante*, p. 50, followed to effect that the delivery by the bankrupt of securities to a bank to secure a clearance loan constituted an illegal preference.

This court approves the findings of the court below that the bank knew of the impending bankruptcy when it demanded and accepted security for an existing loan.

An unusual proceeding in the banking business, such as an officer leaving the bank and going to the customer's office and demanding additional security for a loan made earlier the same day, indicates knowledge of the impending bankruptcy of such customer.

A general promise to give security on demand puts the creditor in no better position than an agreement to pay money and does not justify a delivery of securities after knowledge of impending bankruptcy. It is an illegal preference.

A deposit made after the bank's officers have forbidden payment of checks against the bankrupt's deposit account is a payment and a preference and a set-off cannot be allowed.

200 Fed. Rep. 295, affirmed.

THE facts, which involve the determination of the question of whether the delivery of securities by a broker immediately preceding his bankruptcy to a bank to secure its loan was an illegal preference, are stated in the opinion.

Mr. Lewis H. Freedman, with whom *Mr. Adrian H. Larkin* and *Mr. Leland B. Garretson* were on the brief, for appellant:

Under the agreement when the loan was made, as amplified and modified by the general custom, appellant acquired an equitable lien upon, or right in or to, the money constituting the "day" or "clearance" loan and in or to all securities or proceeds of whatever nature realized, cleared or obtained possession of by the bankrupt Fiske & Co. by the use of such loan in so far as such securities or proceeds were or could be identified as so realized, cleared or reduced to possession.

"A general custom is the common law itself, or a part of it." Written contracts, by implication, incorporate custom into them. *Underwood* v. *Greenwich Ins. Co.*, 161 N. Y. 413, 423; *Newhall* v. *Appleton*, 114 N. Y. 140; *Walls* v. *Bailey*, 49 N. Y. 464; *Botany Works* v. *Wendt*, 22 Misc. Rep. 156; *Hostetter* v. *Park*, 137 U. S. 30, 40; *Robinson* v. *United States*, 13 Wall. 363; *Hazard* v. *New England Ins. Co.*, 8 Pet. 557; *Hartshorne* v. *Union Ins. Co.*, 36 N. Y. 172.

There was an equitable lien, and equity regards as done that which ought to be done. Pom. Eq. Jur., 3d ed., § 1235; *Walker* v. *Brown*, 165 U. S. 654, 664; *Goodnough Co.* v. *Galloway*, 156 Fed. Rep. 504, 510; *Howard* v. *Delgado*, 121 Fed. Rep. 26, 30; *Chattanooga Bank* v. *Rome Iron Co.*, 102 Fed. Rep. 755, 758; *Ingersoll* v. *Coram*, 211 U. S. 335, 368; *Hovey* v. *Elliott*, 118 N. Y. 124; *Holroyd* v. *Marshall*, 10 H. L. C. 191.

One may by express agreement create a charge or claim in the nature of a lien on property of which he is the owner or possessor, and equity will establish and enforce such charge or claim not only against the party who stipulated to give it, but also against third persons, who are either volunteers, or who take the estate on which the lien is agreed to be given, with notice of the stipulations. *Ketchum* v. *St. Louis*, 101 U. S. 306; *Hauslet* v. *Harrison*, 105 U. S. 401; *Carr* v. *Hamilton*, 129 U. S. 252; *Fourth Street Bk.* v. *Yardley*, 165 U. S. 634; *Walker* v. *Brown*, 165 U. S. 654;